3-19

THE SUPREME COURT OF OHIO

STATE OF OHIO,
Plaintiff-Appellee,

v.

ROBERT LEROY PRUETT,
Defendant-Appellant.

CASE NO. 41163

RECEIVED
MAR 6 1968
OFFICE OF
SUPREME COURT, U.S.

CERTIFIED TRANSCRIPT OF RECORD

Joseph E. Mahoney
Prosecuting Attorney
Jefferson, Ohio
Attorney for Appellee:

Nazor & Nazor
Howard M. Nazor
Gordon L. Nazor
Gillmore Building
Main Avenue
Ashtabula, Ohio
Attorneys for Appellant.

STATE OF OHIO)
) SS.
ASHTABULA COUNTY)

IN THE SUPREME COURT OF OHIO

CASE NO. 41163

THE STATE OF OHIO

PLAINTIFF-APPELLEE

-vs-

ROBERT LEROY PRUETT

DEFENDANT-APPELLANT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

1. Notice is hereby given that Robert LeRoy Pruett, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Ohio overruling the defendant's motion for leave to appeal, entered on the 20th day of December, 1967, which appeal was from a final order of the Court of Appeals of Ashtabula County, Ohio, Seventh Appellate District entered on the 23rd day of June, 1967, which affirmed the jury verdict of the Common Pleas Court of Ashtabula County, Ohio, finding the defendant guilty of murder in the first degree and sentencing him to death by electrocution.

This appeal is taken pursuant to 28 U.S.C.A Section 1257 (3).

Appellant was convicted of the crime of murder in the first degree in violation of Ohio Revised Code Section 2901.01; was sentenced to death by electrocution and is presently confined at the Ohio State Penitentiary in Columbus, Ohio.

2. Several questions involving the Constitution of the State of Ohio and the Constitution of the United States will be presented by this appeal.

FILED
FEB 7 1968
SUPREME COURT OF OHIO
THOMAS L. STARTZMAN, Clerk

NAZOR AND NAZOR

BY Gordon L. Nazor

BY Howard M. Nazor

ATTORNEYS FOR DEFENDANT-APPELLANT
Gillmore Building
Ashtabula, Ohio 44004

STATE OF OHIO)
) SS.
ASHTABULA COUNTY)

IN THE SUPREME COURT OF OHIO

CASE NO. 41163

THE STATE OF OHIO
PLAINTIFF-APPELLEE

-vs-

ROBERT LEROY PRUETT
DEFENDANT-APPELLANT

PRECIPE

TO THE CLERK:

Please prepare a certified transcript of the entire Record in this case and forward the same to the Clerk of Court of the Supreme Court of the United States for the reason that the defendant is in the process of preparing and will shortly file in said Court a Petition for a Writ of Certiorari.

NAZOR AND NAZOR

BY Gordon R. Nazor

BY Howard M. Nazor

ATTORNEYS FOR DEFENDANT-APPELLANT
Gillmore Building
Ashtabula, Ohio 44004

FILED
FEB 7 1968
SUPREME COURT OF OHIO
THOMAS L. STARTZMAN, Clerk

THE SUPREME COURT OF OHIO, JANUARY TERM, 1967

CASE NO. 41163

ATTORNEYS	TITLE OF CASE	ACTION
Joseph E. Mahoney Prosecuting Attorney Jefferson, Ohio	State of Ohio, Plaintiff-Appellee, v. Robert LeRoy Pruett, Defendant-Appellant.	Appeal from the Court of Appeals of Ashabula County Motion for Leave to Appeal from the Court of Appeals of Ashtabula County
Nazor & Nazor Howard M. Nazor Gordon L. Nazor Gillmore Building Main Avenue Ashtabula, Ohio		

DATE	MEMORANDA OF PLEADINGS, ETC., FILED, WRITS ISSUED ETC., JUDGMENTS, ORDERS AND DECREES
July 25, 1967	Notice of Appeal and Certificate of Service filed.
July 25, 1967	Extension of Appellant's Memorandum to August 25, 1967. Kingsley Taft, Chief Justice J. 48-302
July 26, 1967	Execution of sentence stayed pending appeal in this Court. Kingsley Taft, Chief Justice. J. 48-303
August 3, 1967	Acknowledgment of Stay by Warden filed.
August 24, 1967	Extension of Memorandum of Appellant to September 25, 1967. Kingsley Taft, Chief Justi J. 48-325
July 25, 1967	Motion to stay execution of death sentence and Certificate of Service filed.

September 25, 1967	Memorandum of Appellant and Certificate of Service filed.
October 17, 1967	Extension of Memorandum Opposing Jurisdiction to November 11, 1967. Kingsley Taft, Chief Justice. J. 48-389
November 29, 1967	Memorandum of Appellee filed.
November 29, 1967	Hearing by Master Commissioners.
December 20, 1967	Motion for Leave to Appeal overruled. J. 48-469
December 20, 1967	Dismissed, Sua Sponte, No Substantial Constitutional question involved. Execution Date February 9, 1968. J. 48-475
January 4, 1968	Motion for stay of execution pending appeal in the United States Supreme Court filed.
January 4, 1968	Stay execution of sentence pending timely appeal to determination by United States Supreme Court. Kingsley Taft, Chief Justice J. 48-489
January 8, 1968	Acknowledgment of stay from Warden filed.
February 7, 1968	Notice of Appeal and Precipe to United States Supreme Court filed.

JOURNAL ENTRIES

JOURNAL 48, Page 302
ENTRY

On written request of counsel for appellant and for good cause shown it is ordered that the time for filing memorandum in support of jurisdiction is extended to August 25, 1967.
/s/ Kingsley Taft, Chief Justice

JOURNAL 48, PAGE 303
ENTRY

This cause pending before this Court on a motion for leave to appeal and an appeal as of right from the Court of Appeals for Ashtabula County, and upon consideration of the motion filed by counsel for Appellant to stay execution of sentence it is therefore

ORDERED that execution of sentence be, and the same hereby is, stayed pending final determination of such appeal by this Court.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this stay of execution to the Warden of the Ohio Penitentiary, who shall acknowledge receipt thereof.
/s/ Kingsley Taft, Chief Justice

JOURNAL 48, PAGE 325
ENTRY

On written request of counsel for appellant and for good cause shown, it is ordered that the time for finling memorandum in support of jurisdiction is extended to September 25, 1967.
/s/ Kingsley Taft, Chief Justice

JOURNAL 48, PAGE 389
ENTRY

On written request of counsel for appellee and for good cause shown, it is ordered that the time for filing memorandum opposing jurisdiction is extended to November 15, 1967.
/s/ Kingsley Taft, Chief Justice

JOURNAL 48, PAGE 469
MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR ASHTABULA COUNTY

It is ordered by the Court that this motion is overruled.

JOURNAL 48, PAGE 475
APPEAL FROM THE COURT OF APPEALS FOR ASHTABULA COUNTY

This cause, here on appeal as of right from the Court of Appeals for for Cuyahoga County, was heard in the manner prescribed by law, and no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein and it appearing to the Court that the date heretofore fixed for the execution of the judgment and sentence of the Court of Common Pleas is now past, this proceeding as required by law does hereby fix the 9th day of February, 1968, as the date for carrying said sentence into execution by the Warden of the Ohio Penitentiary, or in his absence by the Deputy Warden, in accordance with the statutes in such case made and provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this Court be duly certified to the Warden of the Ohio Penitentiary and the Warden make due return thereof to the Clerk of the Court of Common Pleas of Ashtabula County.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Ashtabula County for entry.

JOURNAL , 48 PAGE 489
ENTRY

Upon consideration of the motion, filed by counsel for Appellant, to stay the execution of sentence pending the timely filing of an appeal to the Supreme Court of the United States, it is therefore

ORDERED that the execution of sentence be, and hereby is, stayed pending the timely filing of an appeal to the Supreme Court of the United States, and it is further ordered that if such appeal is timely filed, this stay will continue for an indefinite period pending final determination by the Supreme Court of the United States.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this entry staying execution to the Warden of the Ohio Penitentiary, who shall adknowledge receipt thereof.
/s/ Kingsley Taft, Chief Justice

41163

CASE NO. 598

IN THE COURT OF APPEALS

Seventh District
State of Ohio, Ashtabula County, SS.

THE STATE OF OHIO
Plaintiff-Appellee

vs.

ROBERT LeROY PRUETT
Defendant-Appellant

Filed 7-25-67 Sup. Ct. of Ohio

NOTICE OF APPEAL

(Filed in Court of Appeals--July 20, 1967)
(Filed in Supreme Court--July 25, 1967)

Now comes the appellant and hereby gives notice of his appeal to the Supreme Court of Ohio from a final order of the Court of Appeals of Ashtabula County, of the Seventh Appellate District, entered on the 23rd day of June, 1967, which was as follows:

> "At a Term of the Court of Appeals, Seventh Appellate District, within and for the County of Ashtabula, and State of Ohio, begun and held in the Common Pleas Courtroom at Jefferson, Ohio, on the 23rd day of March, 1966, before the Hon. Nils P. Johnson, the Hon. George M. Jones and the Hon. John J. Lynch, Judges, among other proceedings then and there had by and before said Court, as appears by its Docket, is the following to-wit:
>
> State of Ohio, Plaintiff-Appellee, vs. Robert LeRoy Pruett, Defendant-Appellant, May 19, 1965, No. 598. This cause came on to be heard upon the bill of exceptions, the original papers and pleadings in the Court of Common Pleas of Ashtabula County, Ohio, and was argued by counsel.
>
> On consideration whereof, of all the assignments of error the Court finds that there is no error prejudicial to the defendant-appellant apparent on the record, in said proceedings and judgment, and that, in its opinion, substantial justice has been done to the Party complaining, as shown by the record of the proceedings, and the judgment under review.

LAW OFFICES OF NAZOR & NAZOR

IT IS, THEREFORE, CONSIDERED BY THE COURT, that the judgment aforesaid be, and the same hereby is affirmed, and that the plaintiff-appellee recover from the defendant-appellant its costs herein expended, taxed at $_____.

That a Special Mandate be sent to the Court of Common Pleas of Ashtabula County, to carry this judgment and costs into execution, and it being made to appear to this Court that the day on which the said Robert LeRoy Pruett was, by said Court of Common Pleas duly sentenced to be electrocuted, to-wit: the 18th day of August, 1965, is now past, and pending proceedings of this Court, stay of execution was granted to said Robert LeRoy Pruett, until finally disposed of by this Court, and until further order.

This Court proceeding as required by O.R.C., Sec., 2953.07 to appoint a day for the carrying of said sentence into execution, it is ordered and adjudged that said sentence of death by electrocution, pronounced and passed upon said Robert LeRoy Pruett, by said Court of Common Pleas of Ashtabula County, Ohio, be carried into execution by the Warden of the Ohio Penitentiary on the 1st day of August, 1967, in accordance with the provisions of the Statute in such case made and provided, and that said Warden forthwith make due return thereof to the Clerk of the Court of Common Pleas of Ashtabula County, Ohio.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a copy of this entry be certified to the Clerk of the Court of Common Pleas of Ashtabula County, for entry, and the defendant-appellant, Robert LeRoy Pruett, being now by order of this Court in the custody of the Warden of the Ohio Penitentiary, it is further ordered that a copy of this Entry and Warrant be dully certified to said Warden.

To all of which holdings, orders and judgment, the defendant-appellant, Robert LeRoy Pruett, excepts."

This case did not originate in the Court of Appeals, is on questions of law, and does involve substantial constitutional questions.

NAZOR AND NAZOR
Attorneys for Defendant-Appellant

Service of copy of the foregoing Notice of Appeal is acknowledged this 20th day of July, 1967.

JOSEPH E. MAHONEY
Prosecuting Attorney

LAW OFFICES OF NAZOR & NAZOR

TABLE OF CONTENTS:

Notice of Appeal ---------- 1

Statement of Facts ---------- 3

Questions of Law Presented ---------- 9

Reasons Why Case Contains Issues of Law of Public or Great General Interest and Substantial Constitutional Questions ---------- 11

(1) A seizure and search of a defendant's motor vehicle without a search warrant and not made contemporaneously with the time and at the same place of the arrest is in violation of the 4th Amendment to the U. S. Constitution, and any alleged evidence obtained as a result thereof should be suppressed and the admission of said evidence at the trial of the cause constitutes reversible error ---------- 11

(2) Where the investigation in a criminal case is no longer a general inquiry into an unsolved crime, but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations which lends itself to eliciting incriminating statements, not having effectively warned the suspect of his absolute constitutional right to remain silent, no statement elicited by the police during said interrogation may be used against him at a criminal trial, as said interrogation and said resulting statement being admitted into evidence constitutes a violation of the 6th Amendment to the Federal Constitution and thereby said admission of said evidence constitutes reversible error. See Escobedo v. Illinois, 32 O. O. (2d) 31. Also 378 U. S. 478 (1964) ---------- 18

(3) Where a juror, prior to being sworn as a juror and permitted to sit in the case, makes the statement to other prospective jurors that he is of the opinion that the defendant is guilty, the defendant is deprived of a fair and impartial trial under the 6th Amendment to the Federal Constitution ---------- 21

(4) Where an indictment alleges murder in the first degree while in the commission of rape, it is error for the trial Court to permit the indictment to be amended to include a second and separate offense of murder in the first degree while attempting to commit rape. The indictment, however, having been so amended, it is error for the trial Court to submit such indictment to the jury, and it is further error for the jury to return a verdict of guilty generally to the indictment which included two offenses, the two offenses being inconsistent, one with the other ---------- 25

LAW OFFICES OF NAZOR & NAZOR

(5) It is error for the Court to permit rebuttal evidence by the State when in fact said evidence rebuts no part of the evidence of the defense. This evidence having been admitted in rebuttal, it is further error for the Court to refuse the defendant the right to surrebuttal, that is to say, to present evidence refuting the evidence introduced in the State's rebuttal---------- 29

APPENDIX:

Portion of the Record Containing the Oral Ruling of the Common Pleas Court Sustaining the Defendant's Motion to Suppress the Evidence, Which Ruling the Court Subsequently Overruled---------- 37

Journal Entry of the Common Pleas Court Overruling the Motion to Suppress---------- 38

Journal Entry of Common Pleas Court Overruling State's Motion to Amend the Indictment---------- 39

That Portion of Journal Entry Sustaining Motion of State to Amend Indictment---------- 40

Verdict-Guilty, in Common Pleas Court---------- 40

Sentence on Verdict of Murder in First Degree---------- 41

Journal Entry of Common Pleas Court Overruling Motion for New Trial---------- 42

Journal Entry of Court of Appeals---------- 42

Opinion of Court of Appeals---------- 45

Amendments to the United States Constitution---------- 46

Statutes---------- 47

LAW OFFICES OF NAZOR & NAZOR

TABLE OF AUTHORITIES

CASES.

Abel v. U. S., 4 L. Ed. (2d) 668---------- 16
Agnello v. U. S., 70 L. Ed. 145---------- 13,14
Alexander v. Green, 2 O. S. (2d) 231---------- 19
Carr v. State, 22 O. App. 78---------- 24
Dennis v. U. S., 70 S. Ct. 518, 339 U. S. 162----------21
Donald v. State, 11 O.C.D. 483---------- 33
Escobedo v. Illinois, 378 U. S. 478 ----------9, 18, 20
Fahy v. Connecticut, 375 U. S. 85----------11
Harris v. State, 125 O. S. 257---------- 27
Itskin v. State, 51 App. 211---------- 33
Ker v. California, 374 U. S. 23----------13
Mallory v. U. S., 354 U. S. 449----------19
Mapp v. Ohio, 367 U. S. 343----------12, 14
People v. Dorado, 394 P. (2d) 952----------20
Preston v. U. S., 376 U. S. 364----------12, 14
State v. Burnius, 177 O. S. 155----------14, 16
State v. Cimpritz, 158 O. S. 490---------- 27
State v. Lett, 106 App. 285---------- 34
State v. Miles, 41 Abs. 1----------34, 35
State v. Presler, 112 O. App. 437---------- 27
State v. Wozniak, 172 O. S. 517---------- 27
Stoner v. California, 376 U. S. 364---------- 12, 14
U. S. v. Bayette, 299 Fed. (2d) 92----------16
U. S. v. Valentine, C C. Tenn., 202 Fed. Supp. 677----------11
Vecchio v. State, 8 Abs. 335----------35

TEXT.

47 American Jurisprudence, July 1967- July 1968 Supp., p. 74----------16

CONSTITUTION.

Constitution of the United States:
Fourth Amendment----------11, 12, 45
Sixth Amendment---------- 9, 21, 45
Fourteenth Amendment---------- 13, 45

STATUTES.

Ohio Revised Code:
Section 2901.01---------- 25, 26, 27, 46
Section 2941.30---------- 25, 26, 27, 46
Section 2945.10---------- 32, 34, 47
Section 2933.23---------- 11, 48

LAW OFFICES OF NAZOR & NAZOR

CASE NO. 41163

IN THE SUPREME COURT OF OHIO

APPEAL FROM
COURT OF APPEALS OF ASHTABULA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff-Appellee

vs.

ROBERT LeROY PRUETT
Defendant-Appellant

MEMORANDUM IN SUPPORT OF JURISDICTION

STATEMENT OF FACTS.

The defendant-appellant, Robert LeRoy Pruett, hereinafter referred to as the defendant, was indicted at the September, 1964, Term of the Ashtabula County Grand Jury, recalled, for first degree murder for the killing of one Susan Osborne following the commission of rape. This indictment was brought under and by virtue of Section 2901.01 of the Revised Code of Ohio and during the course of the trial a motion was made by the Prosecuting Attorney to amend the indictment to have inserted after the words "in the perpetration of a rape", the words "or attempting to perpetrate a rape", this amendment being permitted under O.R.C. 2941.30 by the Court on February 11.

LAW OFFICES OF NAZOR & NAZOR

1965, the trial of the case having commenced on February 1, 1965. (R. Vol.2, pp. 590-591).

The evidence showed that the defendant, Robert LeRoy Pruett, was a married man who had come to the City of Conneaut, Ohio, to live with his wife in the early summer of 1964; that he was without employment at that time and enrolled in a Manpower Training School in Ashtabula, Ohio, and was attending said school at the time of the alleged commission of the offense.

The evidence indicated that on occasion, the defendant and his wife frequented beer parlors and a short time prior to the date alleged in the indictment, to-wit: September 15, 1964, had made the acquaintance of the decedent, one Susan Osborne, who was seventeen (17) years of age. The evidence further indicated that the defendant and his wife had been in Susan Osborne's company on at least two (2) occasions prior to September 14, 1964, and that Susan Osborne at said times had been in the company of various men; that Susan Osborne, although being seventeen (17) years of age, frequented beer parlors until the early hours of the morning and was subject to little or no supervision from her mother with whom she lived in Conneaut. In other words, Susan Osborne was a person with far more worldly experience than the average girl of her age.

The evidence established that on the night of Monday, September 14, 1964, the defendant and his wife made the rounds of several beer parlors accompanied by one Norman Balcomb, a friend of the defendant. While on these rounds, they came in contact with the deceased girl, Susan Osborne, at a beer parlor and she accompanied them for the remainder of the evening. During the course of the evening the evidence showed that Susan Osborne consumed several drinks of rum and possibly some beer. At about midnight, defendant's wife, Marcia Pruett, who was pregnant, requested to be taken home. After this was done by the defendant and Balcomb, they proceeded to take Susan Os-

LAW OFFICES OF NAZOR & NAZOR

borne to her home in Conneaut, Ohio. At that time, the evidence showed that it was suggested by Balcomb, who lived in Ashtabula, Ohio, that Susan Osborne ride to Ashtabula with the two young men and then the defendant would return her to her home in Conneaut. Pursuant to this arrangement these three people went to Ashtabula in Pruett's Ford automobile, Susan Osborne riding in the back seat with Balcomb and the defendant operating the automobile.

The evidence showed that Balcomb became familiar with Susan Osborne in the back seat of the car. Balcomb, who was a married man, was let out of the car at his home in Ashtabula and Susan Osborne got into the front seat of the automobile with Pruett. Pruett's testimony was to the effect that he had some conversation with the girl and that at a red light on Lake Avenue in Ashtabula, she opened the door and jumped out of the car. Pruett testified that he attempted to follow her, but there was traffic at this point and that he drove around for some time looking for her and that he finally drove home to Conneaut via Route 20 and arrived home at about 1:30 a.m. This testimony as to the time he arrived home was corroborated by the witness, Maxine Morgan the defendant's wife, and by the defendant's mother-in-law, Marjorie Clowes. The uncontradicted evidence of his wife was that there were no blood stains on his clothes and that he had no marks of violence on his body when he arrived home.

The defendant and his wife arose early the following morning when the defendant took his wife to work in Ashtabula and he himself went to the Manpower Training School. Marcia Pruett testified there was no evidence of any blood on the inside of the car.

On Saturday, September 19, 1964, Susan Osborne's nude body was found in some weeds lying about one hundred (100) feet from Lake Road in Ashtabula Township, this area being reached by a lane running south from Lake Road. The authorities were called and it was found that the girl had been dead for

LAW OFFICES OF NAZOR & NAZOR

some time, that all of her clothing had been removed, a part of same lying on the ground near her and part of them folded neatly under her buttocks. Some of the clothing was quite bloody, the face and neck had started to decompose, some of the facial bones, the jaw and the hyoid bone were broken, there was profuse hemorrhaging around the larynx and trachea and there were multiple severe fractures of all facial bones and lower jaw. There was no evidence of forcible removal of the girl's clothing. (R. Vol. 1, pp. 166-167).

At the autopsy, a swab was made to determine the presence of absence of any seminal fluid and no seminal fluid or sperm cells were found. There were no bruises or injuries of any kind around the exterior genitalia or thighs of the deceased girl, which according to the testimony, contraindicated any evidence of force being used to compel her to submit to sexual relations. The evidence clearly showed on both sides of the case that there was no definite proof that the girl had engaged in sexual relations prior to or following her death. Dr. J. R. Higerd, the County Coroner, was unable to say that there had been any sexual assault. (R. Vol. 1, p. 167).

It was discovered on Sunday, September 20, 1964, by the authorities that the defendant was the last known person to have been with the deceased girl. He was picked up shortly before noon on Sunday, September 20, 1964, and was not given benefit of counsel. Deputy Sheriff Roach testified that when he questioned the defendant at the police station in Ashtabula shortly after having picked him up at his home, that the defendant told him that he had taken the girl to the scene of the crime but that she got out of the car and he started to get out after her and at that time he stopped talking and refused to talk further. There was no corroboration of Roach's story. The defendant vehemently denied that he had made this statement and stated that he had told the witness Roach that the deceased girl had gotten out of the

LAW OFFICES OF NAZOR & NAZOR

car on Lake Avenue and that he started to get out after her, but did not on account of traffic. The evidence showed that Roach made no effort to write down any statement made at the police station and made no effort to call in any other officers to hear the alleged statement made by the defendant. Furthermore there was no evidence showing that the defendant was fully advised of his rights, particularly his right to remain silent and that anything he might say might be used against him.

The defendant was never released from custody following the time he was picked up by officers shortly before noon on September 20, 1964, and the defense maintains that he was placed under arrest when he was taken into custody at his home at said time. Later the same day, the defendant was further questioned by the officers and made no admissions of any kind as to guilt and requested that he be given benefit of counsel.

After the defendant's arrest and at a different place than the place where he was arrested, the defendant's Ford automobile, was taken by the proprietor of a private garage on the order of the Sheriff, to this private garage on the outskirts of Ashtabula, Ohio. Later in the same week, the exact time not appearing in the evidence, there were certain articles removed from the car, to-wit: a radio grille and a seat cover. A search warrant was never obtained by the authorities either prior to seizing the car on September 20th or prior to the searching of the car at an unknown subsequent time during that week.

This case came on for trial on February 1, 1965, the trial being concluded on February 23, 1965. A motion was made by the defense that the defendant be discharged at the conclusion of the State's case which was overruled by the Court, this motion being renewed at the conclusion of all the evidence, same being overruled by the Court. The case was submitted to the jury at 3:30 p.m. on February 23, 1965, and the jury returned a verdict of

LAW OFFICES OF NAZOR & NAZOR

guilty of murder in the first degree without mercy at 6:18 p.m. on the same day, having deliberated only two hours and 48 minutes, although the case had taken approximately three (3) weeks to try.

A motion for a new trial was duly filed and argued at length and same was overruled by the trial Court. An appeal was taken on questions of law to the Court of Appeals and on the 23rd of June, 1967, a journal entry was filed in the Court of Appeals affirming the judgment of the lower court, the Court of Appeals writing a very brief opinion and failing to touch upon many of the important constitutional questions raised in this case.

This Memorandum is being filed in this Court seeking to have this Court take jurisdiction of this case by reason of the fact that the case did not originate in the Court of Appeals, and contains issues of law of public or great general interest, and involves substantial constitutional questions.

LAW OFFICES OF NAZOR & NAZOR

QUESTIONS OF LAW PRESENTED.

The questions of law and constitutional questions presented by this appeal are as follows:

(1) A seizure and search of a defendant's motor vehicle without a search warrant and not made contemporaneously with the time and at the same place of the arrest is in violation of the 4th Amendment to the U. S. Constitution, and any alleged evidence obtained as a result thereof should be suppressed and the admission of said evidence at the trial of the cause constitutes reversible error.

(2) Where the investigation in a criminal case is no longer a general inquiry into an unsolved crime, but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations which lends itself to eliciting incriminating statements, not having effectively warned the suspect of his absolute constitutional right to remain silent; no statement elicited by the police during said interrogation may be used against him at a criminal trial, as said interrogation and said resulting statement being admitted into evidence constitutes a violation of the 6th Amendment to the Federal Constitution and thereby said admission of said evidence constitutes reversible error. See Escobedo v. Illinois, 32 O. O. (2d) 31. Also 378 U. S. 478 (1964).

(3) Where a juror, prior to being sworn as a juror and permitted to sit in the case, makes the statement to other prospective jurors that he is of the opinion that the defendant is guilty, the defendant is deprived of a fair and impartial trial under the 6th Amendment to the Federal Constitution.

(4) Where an indictment alleges murder in the first degree while in the commission of rape, it is error for the trial Court to permit the indictment to be amended to include a second and separate offense of murder

LAW OFFICES OF NAZOR & NAZOR

in the first degree while attempting to commit rape. The indictment, however, having been so amended, it is error for the trial Court to submit such indictment to the jury, and it is further error for the jury to return a verdict of guilty generally to the indictment which included two offenses, the two offenses being inconsistent, one with the other.

(5) It is error for the Court to permit rebuttal evidence by the State when in fact said evidence rebuts no part of the evidence of the defense. This evidence having been admitted in rebuttal, it is further error for the Court to refuse the defendant the right to surrebuttal, that is to say, to present evidence refuting the evidence introduced in the State's rebuttal.

LAW OFFICES OF NAZOR & NAZOR

REASONS WHY CASE CONTAINS ISSUES OF LAW OF PUBLIC OR GREAT GENERAL INTEREST AND SUBSTANTIAL CONSTITUTIONAL QUESTIONS

(1) A seizure and search of a defendant's motor vehicle without a search warrant and not made contemporaneously with the time and at the same place of the arrest is in violation of the 4th Amendment to the U. S. Constitution, and any alleged evidence obtained as a result thereof should be suppressed and the admission of said evidence at the trial of the cause constitutes reversible error.

We contend that the search and seizure of the defendant's Ford automobile was unlawful in that it was conducted in violation of the 4th Amendment to the Federal Constitution and, therefore, the car itself was erroneously admitted into evidence as was also certain material taken therefrom.

U.S. v. Valentine, C C. Tenn. (1962) 202 Fed. Supp. 677 holds that the 4th Amendment must be given broad and liberal construction in favor of the individual citizen in order to thwart illegal invasion of constitutional safeguards to the end that this Amendment may at times defend the guilty, but may also protect the innocent.

The 4th Amendment to the Federal Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

O.R.C. 2933.23 provides as follows:

> "A warrant for search shall not be issued until there is filed with the judge or magistrate an affidavit particularly describing the house or place to be searched, the person to be seized, the things to be searched for and seized, and alleging substantially the offense in relation thereto, and that the complainant believes and has good cause to believe that such things are there concealed, and he shall state the facts upon which such belief is based. The judge or magistrate may demand other and further evidence issuing such warrant. If the judge or magistrate is satisfied that grounds for the issuance of a warrant exist or that there is probable cause to believe

LAW OFFICES OF NAZOR & NAZOR

that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched."

Under the evidence in this case, to-wit: that the defendant's automobile was standing in the driveway of the house in which he was living at the time he was taken into custody by the police; that he was subsequently taken to jail in Jefferson, Ohio; that the car was then removed to a place other than the place where the defendant was taken into custody, that at least several days after the defendant was incarcerated, the car was searched; that at no time during this procedure was a search warrant issued; and that certain items taken from the car were later introduced into evidence, and the car itself was introduced into evidence over the objection of the defendant, both by way of motion to suppress and an objection at the time of the trial, it is submitted that the search and seizure of the defendant's automobile was illegal and the subsequent admission in evidence of the car itself and the portion of the interior taken from the car was likewise improper being in violation of the 4th Amendment to the Federal Constitution.

In support of this contention we wish to refer the Court to Fahy v. Connecticut, 375 U. S. 85, (1963); wherein the Court said:

> "Where evidence which has been found as a result of an illegal search, has not been suppressed on request and has been erroneously admitted against a defendant, a conviction should be set aside if it appears that there is a reasonable possibility that the admission of such evidence contributed to the conviction." See also Stoner v. California, 376 U. S. 483; Preston v. U. S., 376 U. S. 364; Mapp v. Ohio, 367 U. S. 343 (1961).

In the instant case the admission into evidence of the car itself and the portion of the interior taken from the car, found as the result of the illegal search was not suppressed on motion of the defendant made prior to the trial. It is established now that in the light of the decision in the Mapp

LAW OFFICES OF NAZOR & NAZOR

case and Ker v. California, 374 U. S. 23 (1963), that the 14th Amendment of the United States Constitution picks up the 4th Amendment, and applies it to state courts, including the federal standards that have developed thereunder. The 14th Amendment of the United States Constitution reads in part as follows:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

It is the contention of the defendant that the search and seizure of his automobile in order to have been legal must have been made substantially contemporaneous with the arrest as to time and place. The search and seizure also must be incidental to a lawful arrest. The leading case here is Agnello v. U. S., 70 L. Ed. 145 (1925). In this case the defendant was arrested in the house of a man named Alba. He was taken to the police station and while being interrogated, other officers went to Agnello's house and, without a warrant, searched for and seized a quantity of cocaine. During the trial of the case, the State attempted to use the cocaine in evidence, but it was excluded by the Court. In its opinion the Court said:

> "Frank Agnello's house was several blocks distant from Alba's house, where the arrest was made. When it was entered and searched, the conspiracy was ended, and the defendants were under arrest and in custody elsewhere. That search cannot be sustained as an incident of the arrest."

The Agnello case is important because of several later cases which relied on the distinction which the Court made between a search and seizure being made in the vicinity of the arrest and about the same time, and a search and seizure made at a place different than the arrest and at a different time. In the Agnello case, the arrest was at the house of a man named

LAW OFFICES OF NAZOR & NAZOR

Alba, and yet the search and seizure was at a different house and later in the same day. In the case of Stoner v. California, 84 S. Ct. 889 (1964), where a room of a guest of a hotel was searched without a warrant, the Court excluded evidence obtained in the search as the search was not an incident to the arrest. The Court in citing and relying on the Agnello case laid down the basic test in this area as to what is "incident to an arrest". In this connection the Court said:

> "But a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." (Underscoring supplied) Agnello v. U. S., 46 S. Ct. 4.

Soon after the Stoner and Preston cases, the Ohio Supreme Court spoke unanimously on this subject. In the case of State v. Burnius, 177 O. S. 155, (decided December 23, 1964), the entire Court speaking through Taft, C. J. said:

> "The Supreme Court of the United States has held that the Fourteenth Amendment to the Constitution of the United States now requires a state court to suppress any evidence, no matter how reliable, acquired as a result of an unreasonable search. This represents a departure from its previous decisions on this precise question. (Mapp v. Ohio, (1961) 367 U. S. 643, 672). However much the writer may disagree with the most recent holding of the Supreme Court on this question or question its wisdom or soundness, we are required to follow it just as we followed its previous holding on the same question. (See State v. Mapp 170 O. S. 427).
>
> "The search of defendant's automobile, having been made after the possessor of the automobile had been arrested and removed with the automobile to the police station, cannot be justified as incident to a lawful arrest." (Preston v. U. S. (1964) 376 U. S. 364.)"

The defendant objected at every stage of the proceedings to the illegal search and seizure and the admission of evidence resulting therefrom. A motion to suppress the evidence illegally obtained was filed prior to the actual trial of the case. This motion was sustained by the Court, a portion

LAW OFFICES OF NAZOR & NAZOR

of his opinion being as follows, to-wit:

> ". . . we have to recognize that under the circumstances shown Pruett has an interest in the car sufficient to let him object and raise the issue concerning this search, the next question being whether or not in the light of the recent decisions this was a lawful search. Well, I don't think too much need be said on that either.
>
> ". . . I think the thing that makes the difference is that after the arrest, and by the way, the transcript shows that the affidavit was filed on the 20th, the same day as the arrest, the evidence in this motion shows that the search was not made until some time during the following week, and it hasn't been specifically pointed up as to when.
>
> "Now after the car was in possession of the law, certainly then a search warrant could have been obtained easily enough. It wasn't, and of course, that is the issue we are dealing with. Was it necessary? While I may have some personal opinions about some of these rules, I have to follow what I plainly see and I don't see how this search under these circumstances, in view of these rules or the rule as announced in several of these cases, can be justified.
>
> "The motion to suppress will be sustained and the prosecution ordered to return the car, the radio and the piece of the seatcover."

Immediately following the hearing on the motion to suppress, a motion was filed by the State to re-open the hearing which was granted by the Court. The only additional testimony given on behalf of the State was that it had evidence to prove that the automobile was an instrument or implement used in the commission of the crime. (R. Vol. 1, p. 116). The Court thereupon re-opened the hearing, reversed its former holding, and when the automobile and the parts taken therefrom were offered in evidence at the trial, same was admitted over the objection of the defendant. It is submitted that the mere fact that the deceased girl might have been transported in the car during the night of the alleged murder, did not make the automobile an instrument or implement used in the commission of the crime. Furthermore, this evidence was available at the first hearing on the motion.

LAW OFFICES OF NAZOR & NAZOR

The Court in reversing itself stated that the automobile could be searched and seized because the officers had "probable cause to believe that a motor vehicle has been used in connection with the commission of the crime, not necessarily the instrumentality alone by means of which the death is caused . . ." (R. Vol. 1, p. 153). The Court did not hold that the automobile was an instrument or implement in connection with the commission of the crime, but only that the officers had probable cause to believe the automobile had been used in connection with the commission of the crime, completely ignoring the decisions of the United States Supreme Court previously cited in this Memorandum and the Burnius case.

Nowhere does the law warrant seizure and search of an object which is used in connection with the commission of the crime without a search warrant. The car itself and the material taken therefrom were purely evidentiary matters, and, therefore, were improperly admitted into evidence. With reference to the seizure of purely evidentiary matters, a good summation of the legal principle involved here is contained in 47 Am. Jur. Supp. pp. 69-70, wherein it is stated:

> "Thus it is clear that a search of premises without a warrant, made in connection with a lawful arrest, is not by nature an unlawful search, nor is it by its nature lawful; the right to make such a search is a strictly limited one; only a reasonable search is permissible, and the bounds of reasonableness are overstepped when (1) the premises searched are separated from the place where the arrest was made or (2) the search is a 'general' and 'exploratory' one; or (3) the search has as its purpose the seizure of things to be used purely as evidence (as distinguished from the fruits of the crime--such as stolen property--and the means by which it was committed) . . ." (Underscoring supplied.)

Two recent Supreme Court cases which distinguish between instrumentalities and evidentiary matters are U. S. v. Bayette, 299 Fed. (2d) 92 and Abel v. U. S., 4 L. Ed. (2d) 668. When the instant case was tried, the

LAW OFFICES OF NAZOR & NAZOR

car, radio grille, and seatcovers were all admitted in evidence over the objection of the defense, the same arguments being advanced at that time that were advanced at the hearing on the motion to suppress, but the trial Court entirely ignored the ample authorities dealing with unlawful search and seizure and admitted all of the exhibits.

LAW OFFICES OF NAZOR & NAZOR

(2) Where the investigation in a criminal case is no longer a general inquiry into an unsolved crime, but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations which lends itself to eliciting incriminating statements, not having effectively warned the suspect of his absolute constitutional rights to remain silent, no statement elicited by the police during said interrogation may be used against him at a criminal trial, as said interrogation and said resulting statement being admitted into evidence constitutes a violation of the 6th Amendment to the Federal Constitution and thereby said admission of said evidence constitutes reversible error. See Escobedo v. Illinois, 32 O.O. (2d) 31. Also 378 U. S. 478 (1964).

At the police station after the defendant's arrest, he was questioned by Deputy Roach, who testified that the defendant told him that he had taken the deceased girl to the scene of the crime, that she got out of the car, that he started to follow her, and then he allegedly said, "I didn't do it. I didn't do it.", and then refused to speak further. (R. Vol.2, pp. 527, 530, 840, 843). This statement the defendant vehemently denied making.

With reference to the constitutional guarantee of the right to remain silent when a general inquiry has begun to focus on a particular suspect, the suspect has been taken into police custody, the police ca... out a process of interrogations that lends itself to eliciting incriminating statements, and the police have not effectively warned the suspect of his absolute constitutional right to remain silent, in violation of the 14th Amendment to the Federal Constitution, no statement elicited by the police during the interrogation may be used against him at a criminal trial, in accordance with the decision of Escobedo v. Illinois, 32 O.O.(2d) 31, 378 U.S. 478(1964).

The only evidence concerning the foregoing was that of Deputy Roach and is as follows, to-wit:

> "I told him that I knew that he had been in the presence of this girl and of how terrible this crime is and I asked him if he wanted to talk to me about it and I advised him that he didn't have to say anything to me until he got an attorney. He could call whoever he wanted for help, but I felt sure if he was involved in this it would be best if he would tell me about it." (R. Vol. 2, p. 445.)

LAW OFFICES OF NAZOR & NAZOR

This testimony of Roach was uncorroborated.

At no place in the Record was the defendant ever told that he had the right to remain silent and that anything he might say could be used against him. This rendered any alleged statement inadmissible. See Alexander v. Green, 2 O. S. (2d) 231 (1965). The Alexander case was decided after the instant case was tried, and the Court held that before a voluntary statement of a defendant may be used in evidence, he must first be advised that anything he might say may be used against him.

We submit that any statement elicited from the defendant in the police station by Roach was illegally obtained and constituted a violation of the defendant's constitutional rights. Although the alleged statement made by the defendant was not a confession, it was an admission against interest. A leading case on this is Mallory v. U. S., 354 U. S. 449.

In the Mallory case the defendant was a 19 year old lad of limited intelligence who was arrested by the police on suspicion of rape. Even though the police had ample evidence from other sources than the defendant for regarding him as a chief suspect, they first questioned him for approximately one-half hour then asked him to submit to a lie detector test and to another test after four more hours of detention. He was not told of his right to counsel or to preliminary examination before a magistrate, nor was he warned that he might keep silent and that any statement made by him might be used against him. The defendant in the Mallory case was convicted and the death penalty imposed. The Circuit Court affirmed the conviction and the United States Supreme Court reversed it by a unanimous decision. Justice Frankfurter's opinion was as follows:

> "The arrested person may be 'booked' by the police. But he is not to be taken in to police headquarters to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt."

LAW OFFICES OF NAZOR & NAZOR

The most recent decision which would be applicable to our case on this proposition is the case of Escobedo v. Illinois, 378 U. S. 478 (1964). In this case a murder conviction was reversed by the United States Supreme Court, the following language being used in the syllabus of the case, to-wit:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, * * * * and the police have not effectively warned him of his absolute constitutional right to remain silent, * * * * and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

Following the Escobedo case is the California Supreme Court case of People v. Dorado, 394 P. (2d) 952 (1964). In reversing a murder conviction, the Supreme Court of California relied on the Escobedo rationale holding among other things that the failure of the police to advise the defendant of his right to remain silent was in violation of the Federal Constitution and rendered any statement which he had made inadmissible.

The provisions of the Federal Constitution which we claim have been violated by the admission of the alleged statement made by the defendant, are the 14th Amendment to the Federal Constitution which provides in part:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction equal protection of the law."

LAW OFFICES OF NAZOR & NAZOR

(3) Where a juror, prior to being sworn as a juror and permitted to sit in the case, makes the statement to other prospective jurors that he is of the opinion that the defendant is guilty, the defendant is deprived of a fair and impartial trial under the 6th Amendment to the Federal Constitution.

The 6th Amendment to the Federal Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . "

In determining and defining the word "impartiality" the following language is used in Dennis v. U. S., (1950) 70 S. Ct. 518, 339 U. S. 162:

> "'Impartiality' is not a technical conception but is a state of mind, and for ascertainment of such mental attitude of appropriate indifference, this amendment guaranteeing impartial jury lays down no particular test for procedure and is not chained to any ancient and artificial formula."

In the instant case we feel that it was clearly shown that the juror Gillespie was guilty of the grossest kind of misconduct when he stated unequivically on his examination as a prospective juror that he had not formed or expressed an opinion regarding this case. (R. Vol.2, P. 13). He made the statement again, (R. Vol. 2, p. 14), stating that he could be a fair and impartial juror and that he would be one hundred percent neutral if permitted to sit. Again he testified to the same effect on examination by the Prosecutor. (R. Vol. 2, pp. 20-21). On examination by defense counsel he was asked:

> "Do you have an opinion right now as to his guilt or innocence?"

and his answer was:

> "No sir, I do not." (R. Vol. 2, p. 24).

He was further asked by defense counsel:

"Q. But you are sure that there were no accounts that you read or anything that you heard anybody else say that would cause you to form

LAW OFFICES OF NAZOR & NAZOR

an opinion as to the merits of this case?

"A. No sir."

Later in Mr. Gillespie's testimony (R. Vol. 2, p. 27) he was examined by the Court as to the condition of his wife who he had previously testified was ill and might of necessity have to be taken to the hospital at any time. The Court asked him:

"Q. Let's get at it this way then. How do you feel about it? Do you feel that you could serve in the light of this circumstance or that you could not? We will go from there.

"A. I feel as though I could. If either law enforcement agency or someone would be notified in case of emergency and the boy couldn't be located, that she would be rushed to the hospital because when she gets these attacks she can't breathe. The bronchial tubes close and as long as someone could get her there, I feel I could serve." (R. Vol. 2,pp. 33-34).

The above question and answer is set forth here to show the extreme anxiety on the part of Mr. Gillespie to serve as a juror which ties in with the statements the defense proved that he made before being sworn as a juror showing his prejudice.

The affidavit and testimony of Gene R. Osborne who was a panel member but who was not finally selected to sit as a juror, was to the effect that the juror Gillespie prior to being called for voir dire examination stated on several occasions within Mr. Osborne's hearing, that in his opinion Robert LeRoy Pruett was guilty of the crime for which he was charged and at a later time shortly before Gillespie was called into the jury box, he expressed his opinion very clearly that he thought Pruett was guilty and that he was anxious to serve on the jury because he wanted to see him found guilty. Mr. Osborne not only gave his affidavit which was admitted in evidence but he testified to substantially the same things that were covered in his affidavit. (R. Vol. 2, Supp. pp. 2-28). In his testimony he stated that he heard Gillespie state his opinion several times prior to being sworn as a

LAW OFFICES OF NAZOR & NAZOR

juror, and he testified that Gillespie said he thought the defendant was guilty and there were other people around in the vicinity, although he could not tell exactly who they were but he believed prospective jurors Shannon and Ball were there. His testimony is replete both with statements on direct and cross-examination that he heard Gillespie say he thought the defendant was guilty and although the Prosecutor on cross-examination tried to shake him in this regard, he insisted throughout his cross-examination that he had heard these statements.

Another prospective juror who was not finally selected to sit but who was on the panel was William Shannon, who was called by the State on the hearing of the motion for a new trial. He stated on cross-examination (R. Vol. 2, Supp. p. 62), that he heard Gillespie state before he was finally chosen as a juror that he would like to sit on the jury, which simply adds to the misconduct of the juror who has formed an opinion, has expressed it and then makes the statement he wants to sit on the jury. How could any Court say that such a man could be fair and impartial?

The Court in his opinion overruling the motion for a new trial would not admit the affidavit of the juror Vivian Hall, this affidavit being to the effect that the jurors freely discussed the evidence in the case after they had been sworn as jurors and during the progress of the trial.

The affidavit of Mrs. Hall is replete with derogatory statements made by various members of the jury regarding the defendant and in particular statements made by the juror James Gillespie, who said at one time that he thought the defendant was guilty and as the case progressed, he said at various times in substance "my mind hasn't changed". Mrs. Hall's affidavit stated that on one occasion in response to what Mr. Gillespie had said, Mrs. Hall said in substance, "What do you mean, your mind hasn't been changed?". Mr. Gillespie said in substance, "Can't you see the man is guilty?". It

LAW OFFICES OF NAZOR & NAZOR

must be borne in mind that all of the matters contained in Mrs. Hall's affidavit took place prior to the final submission of the case to the jury, some of the occurrences transpiring outside the jury room.

The matters contained in the affidavit and testimony of Gene R. Osborne were not instances occurring after Gillespie had been sworn as a juror, but rather all of these matters occurred prior to his final selection as a juror. Following the statements mentioned above, he took the jury box and on his voir dire swore that he had no opinions and could be a fair and impartial juror. Can it be said, in view of this clearly proven misconduct on the part of Gillespie that the defendant had a fair and impartial trial by a fair and impartial jury? We emphatically say that it cannot.

In the case of Carr v. State, 22 O. App. 78, the Court said:

> "Juror who, on his voir dire in bribery prosecution, falsely stated that he had not formed or expressed an opinion as to accused's guilt, held not qualified as juror, and conviction must be reversed."

There are other Ohio citations too numerous to set forth in this Memorandum.

The trial Court held in overruling the motion for a new trial that the affidavit of Vivian Hall was inadmissible because evidence aliunde had not been offered. It is submitted that the testimony of the prospective juror, Gene R. Osborne, who was never sworn as a juror, was sufficient evidence aliunde to have permitted Mrs. Hall's affidavit to have been admitted in evidence and to have been considered by the Court. The evidence of Gene R. Osborne both by affidavit and by way of his testimony was evidence as to matters occurring before the jury was finally sworn and had to do with misconduct, particularly of Mr. Gillespie, and we submit this evidence was sufficient to have afforded the trial Court the right to consider Vivian Hall's affidavit, and it also being in our opinion amply sufficient for this Court to assume jurisdiction.

LAW OFFICES OF NAZOR & NAZOR

(4) Where an indictment alleges murder in the first degree while in the commission of rape, it is error for the trial Court to permit the indictment to be amended to include a second and separate offense of murder in the first degree while attempting to commit rape. The indictment, however, having been so amended, it is error for the trial Court to submit such indictment to the jury, and it is further error for the jury to return a verdict of guilty generally to the indictment which included two offenses, the two offenses being inconsistent, one with the other.

It is contended that the Court erred in permitting the indictment in this case to be amended. (R. Vol. 2, pp. 589, 590, 591).

The indictment as returned by the Grand Jury reads as follows:

"State of Ohio, Ashtabula County, SS. In the Court of Common Pleas Ashtabula County, Ohio, of the Term of September in the Year of Our Lord 1965 recalled, the jurors of the Grand Jury of the State of Ohio within and for the body of the County of Ashtabula, impaneled, sworn and charged to inquire of crimes and offenses committed within the said County of Ashtabula in the name and by authority of the State of Ohio upon their oaths do find and present that one Robert LeRoy Pruett, late of said County, on or about the 15th day of September, in the Year of Our Lord 1964, with force and arms in said County of Ashtabula and State of Ohio, did unlawfully, purposely and while in the perpetration of a rape kill Susan Osborne, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Ohio." The amendment to the indictment permitted by the Court consisted of the insertion of the following words, "or attempting to perpetrate a rape" immediately following the words "in the perpetration of a rape."

The indictment in this case was brought under O.R.C. 2901.01, a portion of which Statute reads as follows:

> "No person shall purposely, either of deliberate or premeditated malice, or by means of poison, or in perpetration or attempting to perpetrate rape, arson, robbery, or burglary, kill another."

O. R. C. 2941.30 provides for the amending of an indictment and

LAW OFFICES OF NAZOR & NAZOR

reads in part as follows:

> "The Court may at any time before, during, or after a trial amend the indictment, information, or Bill of Particulars, in respect to any defect, imperfection or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime."

The reading of O. R. C. 2941.30 clearly indicates that no change in the name or identity of the crime charged may be permitted by amendment and this Section does permit amendment "in respect to a defect, imperfection or omission in form or substance, or any variance with the evidence, . . ." The Record does not disclose that the Prosecutor advanced any reasons why he decided to amend the indictment, the arguments of counsel on both sides not appearing in the Record. However, defense counsel strongly argued against the amending of the indictment for the following reasons, to-wit:

(1) A new crime was added to the indictment, to-wit: "while attempting to commit rape."

(2) The amendment could not possibly have been made "in respect to any defect, imperfection or omission in form or substance, or an any variance with the evidence . . ."

In discussing our first ground of objection, the reading of the Statute under which the indictment was brought, to-wit: O.R.C. 2901.01, discloses that there is a crime of killing another in perpetrating rape and also a crime of killing another in attempting to perpetrate a rape. The indictment as originally returned by the Grand Jury properly charged the crime of murder in perpetrating a rape. There was no defect, imperfection or omission in form or substance in the original indictment. Therefore, it could not be amended with respect to these matters. If the Grand Jury failed to indict for murder while attempting to commit a rape, this could have been remedied by the recalling of the Grand Jury and the returning of another indictment. However, it is submitted that this new offense could not be added to the

LAW OFFICES OF NAZOR & NAZOR

original indictment because this would be contrary to O. R. C. 2941.30.

With reference to our second ground of objection to the amending of the indictment, a careful reading of the Record will clearly disclose that the indictment could not possibly be amended in respect to any variance with the evidence. It was not proven by the evidence in this case that a rape was committed and there was absolutely no evidence in the case that a rape was attempted. However, it may be stated at this point that the uncontradicted facts in this case contraindicate an attempt to rape and likewise, contraindicate the actual rape itself as alleged in the original indictment. See State v. Wozniak, 172 O. S. 517, State v. Cimpritz, 158 O. S. 490, State v. Presler, 112 O. App. 437. Also see Harris v. State, 125 O. S. 257.

In the Harris case the Court said:

"The material and essential facts constituting an offense are found by the presentment of the grand jury; and if one of the vital and material elements identifying and characterizing the crime has been omitted from the indictment such defective indictment is insufficient to charge an offense, and cannot be cured by the Court, as such a procedure would not only violate the constitutional rights of the accused, but would allow the Court to convict him on an indictment essentially different from that found by the grand jury."

The following language is found in the Wozniak case:

"Any other holding in a case such as this would be inconsistent with the provisions of Section 10 of Article I of the Constitution of Ohio providing that 'no person shall be held to answer for' a crime such as this 'unless on presentment or indictment of a grand jury'. To require defendants to answer for the crime sought to be charged in count one of this indictment after amendment of the indictment by addition thereto of a missing charge of an essential element of that crime would be to require defendants to answer for a crime other than on 'presentment or indictment of a grand jury'. In order to justify conviction of a defendant for such a crime, the grand jury and

LAW OFFICES OF NAZOR & NAZOR

not the prosecutor, even with the approval of the Court, must charge the defendant with each essential element of that crime."

LAW OFFICES OF NAZOR & NAZOR

(5) It is error for the Court to permit rebuttal evidence by the State when in fact said evidence rebuts no part of the evidence of the defense. This evidence having been admitted in rebuttal, it is further error for the Court to refuse the defendant the right to surrebuttal, that is to say to present evidence refuting the evidence introduced in the State's rebuttal.

After the defendant had rested his case the State in rebuttal offered further evidence by way of the testimony of Rosemary Karr. (commencing R. Vol. 2, p. 1181). Mrs. Karr testified in substance that she and her husband lived in a house which in general abuts the southeast corner of the residence property of Maxine Morgan, the defendant and his wife living at that time at the Morgan residence. Mrs. Karr testified in substance that during the early morning of September 15, 1964, she was asleep in one of their bedrooms which was on the north side of their home and which had windows facing in the direction of the Maxine Morgan residence. She testified that about 2:30 a.m. she awoke and as she was quite awake, she turned on her radio. This testimony was objected to by the defense as not being rebuttal evidence but the objection was overruled. She testified that she laid awake and then Maxine Morgan's light went on, which consisted of a floodlight located over her back door. She said that a few seconds later she heard a door slam and saw Marcia Pruett, defendant's wife, run across the driveway to the east and down the Morgan driveway to the north and then to the east towards town. Her testimony was that this occurred at about 3:10 a.m. She also testified that this was a very nice, clear night. At this point defense offered strenuous objection asking that the testimony be stricken as not rebuttal which was overruled by the Court. (R. Vol. 2, pp. 1187-1188).

On cross-examination Mrs. Karr testified that there was a high hedge between her residence and the Morgan residence. (R. Vol. 2, p. 1192). She also testified on re-cross-examination that she had not related these facts to the authorities until two nights before she was called to testify in rebuttal. (R. Vol. 2, p. 1196).

LAW OFFICES OF NAZOR & NAZOR

The State thereupon rested and the defense at this juncture asked the Court to re-open its case to put in further testimony or, in the event that was denied, for the right to offer surrebuttal evidence refuting in particular the testimony of the State's rebuttal witness, Rosemary Karr. (R. Vol. 2, pp. 1215-1221). The defense directed the Court's attention to O.R.C. 2945.10, which sets out the order of proceedings in a criminal case, and which provides in part:

> "(D) The State will then be confined to rebuttal evidence, but the Court, for good reason, in furtherance of justice, may permit evidence to be offered by either side out of its order.
>
> "(G) . . . The Court may deviate from the order of proceedings listed in this section."

After the defense brought to the Court's attention several authorities and discussed its position, the Court overruled defendant's motion and the defense proceeded by calling to the stand the witness Maxine Morgan. The Court permitted the witness to answer preliminary questions. However, the substance of her testimony was excluded and the defense placed the same in the Record by the method of asking a question, and when the same was objected to by the State and the objection sustained, proffering the answer.

In essence the proffered testimony of Maxine Morgan was to the effect that during the early morning of September 15, 1964, she was at her residence at 519 Liberty Street, Conneaut, Ohio, and was up and about until she retired at 2:30 a.m.; that after going to bed, she laid awake until approximately 3:45 a.m.; that during said period she heard no slamming of her back door; that her bedroom was on the first floor of the house and that her bed was within six (6) feet of the lower end of the stairway which leads to the second floor and fifteen (15) feet from the back door of her residence; that at about the hour of 3:10 a.m., of the morning of September 15, 1964, she was awake and that no person left her house; that when the floodlight

LAW OFFICES OF NAZOR & NAZOR

on her back door is illuminated, it shines into her bedroom, but that on the morning of September 15, 1964, at about 3:10 a.m., the floodlight did not shine into her bedroom; that the stairs leading to the second floor of her house are creaky; and that at the back of her property along the southerly line of the same and in front of the Karr residence on September 15, 1964, there existed a high hedge approximately twenty (20) feet in height which during the month of September was very luxuriant. (R. Vol.2, pp. 1222-1235).

At this point the defense had its Exhibits G, H, I, and J marked for identification one of which was a photograph taken in Miss Morgan's back yard on September 7, 1964, exactly one week prior to September 14, 1964, with the camera pointing in a southeast direction showing the foliage which existed at that time on that portion of the hedge at the back of her property with the Karr house in the background, the remaining photographs being taken at a later time during the winter months when there was no foliage on the hedge but showing general views of the hedge with reference to the Karr residence and general views of the Karr residence, the Adamack residence, the Morgan residence, the back yard of the Morgan residence and the high hedge, all with reference to each other.

The defense then called Marjorie Clowes to testify for the same reason as the preceding witness. With the exception of several preliminary questions, the testimony of this witness was also excluded, and the Record was made up in the same fashion as with the witness Maxine Morgan. The proffered testimony in essence was as follows, to-wit: that Mrs. Clowes was the mother of Marcia Pruett; that her bedroom in the Morgan house was on the second floor a short distance from the top of the stairway and almost directly over the back door; that the stairs on the morning of September 15, 1964, were creaky and that on said morning at or about 3:10 a.m. no one left the Morgan house or slammed the back door and that she was awake during the

LAW OFFICES OF NAZOR & NAZOR

entire evening and during the early morning until approximately 3:30 a.m. (R. Vol. 2, pp. 1231-1243).

The defense then offered three witnesses: Wilber P. Dyer, John Tyler and David Weir, on the same basis as the preceding witnesses, namely, to rebut the testimony of the State's witness, Rosemary Karr and the Court excluded the testimony of these three witnesses and the testimony was proffered by the defense in the same fashion as was done with the witnesses, Morgan and Clowes. (R. Vol. 2, pp. 1242-1264).

It is the contention of the defense and was strongly urged during the trial that the evidence of the witness Rosemary Karr was not rebuttal evidence and should not have been permitted after the defense rested. If it had any value at all to the State, its value would have been as direct evidence because apparently what the State was trying to imply by this evidence was that the defendant was not home at 3:00 a.m. on the morning of September 15, 1964, and that his wife left the house in an effort to find him. Had this been presented in chief, which would have been the proper time, there would have been no question about the right of defense to present its evidence in opposition in the defense in chief.

Be that as it may, the Court did permit this evidence to be introduced as rebuttal evidence which we submit was highly improper, the jury having heard this evidence. However, in furtherance of justice and by virtue of O.R.C. 2945.10, we feel that it was the duty of the Court to exercise its discretion liberally towards the defendant and not take the narrow view which was taken by the Court. The Court went so far as to permit the defendant and his wife to testify in what may be called surrebuttal but then cut the evidence off and did not permit the disinterested witnesses offered by the defense to testify. This we submit as one of the grossest errors against this defendant and was certainly a flagrant abuse of the Court's discretion.

LAW OFFICES OF NAZOR & NAZOR

In support of our contention, we would like to refer to several Ohio authorities.

In the case of Itskin v. State, 51 App. 211 (1953), the Court said:

> "The other error complained of in the Itskin case relates to certain rebuttal, which the defense contends was not proper rebuttal, and should have been offered in chief."

The record in the Itskin case discloses no objection to the witness being called for rebuttal, and the Court then permitted Itskin to call a witness for surrebuttal. There was no prejudicial error in what was done.

The Itskin case clearly holds that there exists in Ohio the right for the defense to submit surrebuttal in answer to rebuttal by the State in criminal cases. Further it would appear that the defendant went one step further in the instant case in improving his position over the Itskin case in that the defense objected to the State's so-called rebuttal evidence (Rosemary Karr) whereas in the Itskin case, the defense was permitted surrebuttal even though he did not choose to object to the State's rebuttal evidence.

Further in the Itskin case, it would appear that the rebuttal evidence offered actually was evidence that should have been offered in chief. The Court let the evidence in, however, in rebuttal, which is all the more reason why the defendant should have had the right to surrebuttal.

Another very important case in Ohio is the case of Donald v. State, 11 O.C.D. 483 (1900). In this case the Court said:

> "By the law of evidence testimony competent in chief, by that fact is rendered incompetent in reply. The rule, however, is subject to the discretional authority of a trial court to re-open a case in chief at any time before it is finally closed and let such evidence in. But this should not be done when without fault on his part, the reason of the discharge of witnesses, or otherwise, a party would be cut off from an answer to the new testimony, which he might have made if it had been regularly given.

LAW OFFICES OF NAZOR & NAZOR

". . . I presume all trial courts have re-opened cases for the purpose of letting in, during the reply, new evidence that properly and strictly would be in chief. But in connection with that, the rule always has been, as we have understood and seen it applied that if the plaintiff re-opens, the defendant has a right to rejoin. (Underscoring supplied.)

In State v. Lett, 106 App. 285, (1958), the State put evidence on in rebuttal and the Court held:

"Inasmuch as the defendant first raised the issue and produced his evidence in support thereof, the State was entitled to an opportunity to rebut it. In doing so, the State introduced no new matter, so that there was no occasion for surrebuttal by defendant." (Underscoring supplied.)

This case again recognizes the right of the defendant to present surrebuttal if the State has instroduced new matter in its rebuttal testimony. A reading of the Record in the instant case clearly demonstrates that the testimony of Rosemary Karr was new matter.

With reference to the construction of O.R.C. 2945.10, the Court's attention is directed to the case of State v. Miles, 41 Abs. 1 (1943). In this case the Court permitted the State while in the midst of examining a rebuttal witness, to stop, re-open the defense's case in chief for further cross-examination of a defense witness and then go back to further examination of its own rebuttal witness. The Court in permitting this went back to the Statute which preceded O.R.C. 2945.10 and which was in effect in 1929 and provided:

"The State will then be confined to rebuttal evidence unless the Court for good reason in furtherance of justice shall permit it to offer evidence in chief."

The old Statute was much more liberal and it would not be difficult to see how the Court in the Miles case would reach the decision it did if it were operating under the Statute. However, the liberal form of this Statute was

LAW OFFICES OF NAZOR & NAZOR

changed in 1929 and the Court in the Miles case (1943) still adhered to the liberal construction by allowing this evidence in chief. This case, therefore, stands for the proposition here that the Court, in addition to having the power to permit the defense to offer surrebuttal, could have also attacked the problem not through the doctrine of surrebuttal, but by virtue of the Miles case could have permitted the defendant to re-open his case in chief, and then offer his evidence in refuting the testimony of Rosemary Karr. In passing let it be said that all of these cases show a very broad power in the Court to permit justice to be done. It must be borne in mind that this was a first degree murder case wherein the defendant's life was at stake which is all the more reason for the Court exercising a wide discretion in furtherance of justice.

Another case decided since the present Statute has been in effect, which shows how far the Courts have gone in applying the wide discretion of the trial judge in furtherance of justice, is the case of Vecchio v. State, 8 Abs. 335 (1930), where the Court permitted the State to re-open the case and put in testimony as to the age of the defendant after the case had been submitted to the jury saying that, "We think it would have been great error on the part of the Court under such a situation to refuse the application of the State even at that point in the trial, to offer evidence concerning the defendant's age."

LAW OFFICES OF NAZOR & NAZOR

CONCLUSION

It is, therefore, respectfully submitted that for the foregoing reasons, the decision of the Court of Appeals herein has raised issues of law of public or great general interest, and substantial constitutional questions, and, therefore, should be reviewed by this Court.

Respectfully submitted,

NAZOR AND NAZOR

ATTORNEYS FOR DEFENDANT-APPELLANT

I, Joseph E. Mahoney, Prosecuting Attorney of Ashtabula County, Ohio, hereby acknowledge receipt of a copy of the within Memorandum this day of , 1967.

JOSEPH E. MAHONEY
ATTORNEY FOR PLAINTIFF-APPELLEE
ASHTABULA COUNTY, OHIO

LAW OFFICES OF NAZOR & NAZOR

PORTION OF THE RECORD CONTAINING THE ORAL RULING OF THE COMMON PLEAS COURT SUSTAINING THE DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE, WHICH RULING THE COURT SUBSEQUENTLY REVERSED.

I am of the opinion, in light of the theory expressed in Jones, United States Supreme Court, we have to recognize that under the circumstances shown Pruett has an interest in the car sufficient to let him object and raise the issue concerning this search, the next question being whether or not in the light of the recent decisions this was a lawful search. Well, I don't think too much need be said on that either.

This record doesn't show anything with respect to why the car was taken on the same day of the arrest other than there was some evidence that the car had fictitious plates on it; but it wasn't taken off the street. Well, in this testimony last given here by Balcomb, which I don't see as that has any bearing on it, he had no interest--a Third party had no interest in the car to grant any permission or issue any directions. So it seems to me applying the rule of the Preston case the search was not contemporaneous with the arrest either as to time or place.

Now the seizure apparently was. I would be inclined to think that the seizure was sufficiently timely from the evidence that I have heard, namely, that it was on the same day, within a matter of three or four hours, which I think is sufficient so far as the time element is concerned.

These cases don't hold that the seizure must be made at the instant of arrest. The language used in all these cases does not so indicate; but after all, the real predicate is, as I view it, under all the circumstances could a warrant reasonably have been obtained and still have come up with the same objective?

Now if that language is used in some of the opinions, I haven't see it, but it seems to me as a result of these opinions that is about what it amounts to. Without going into a lot of detail and illustrations, the

LAW OFFICES OF NAZOR & NAZOR

right to search and to seize something from the person to prevent escape, assault, and to pick up and take possession of the evidence concerning the crime for which the arrest is made--that kind of thing--timewise, I think this could have been justified. Spacewise I still agree, I don't think that moving the car three blocks is the thing that makes the difference. I think the thing that makes the difference is that after the arrest, and by the way, the transcript shows that the affidavit was filed on the 20th, the same day as the arrest, the evidence in this motion shows that the search was not made until some time during the following week, and it hasn't been specifically pointed up as to when.

Now after the car was in possession of the law, certainlythen a search warrant could have been obtained easily enough. It wasn't, and of course that is the issue we are dealing with. Was it necessary? While I may have some personal opinions about some of these rules, I have to follow what I plainly see and I don't see how this search under these circumstances in view of these rules or the rule as announced in several of these cases, can be justified.

The motion to suppress will be sustained and the prosecution ordered to return the car, the radio, and the piece of the seatcover.

MR. H. NAZOR: Would that be broad enough to cover anything taken from the car? It is not within our knowledge, of course, anything they did.

THE COURT: Yes, and any other articles that were taken. There is no indication in the order that there was, but the order will so read. Mr. Nazor, you prepare and submit a journal entry accordingly.

JOURNAL ENTRY OF THE COMMON PLEAS COURT
OVERRULING MOTION TO SUPPRESS
(Filed: January 27, 1965)

This cause came on for hearing on January 21, 1965, the defendant being present and represented by counsel, upon the motion of the defendant

LAW OFFICES OF NAZOR & NAZOR

to suppress the evidence seized bythe Sheriff in this case and to order a return to the defendant of the property mentioned in said motion, to-wit: a motor vehicle and any items taken therefrom by the State, and again on January 27, 1965, came on for further hearing, an application of the State to submit further evidence on said motion to suppress having previously been allowed by the Court, and same was argued and submitted.

Upon consideration of the evidence the Court finds that the defendant having physical possession of the motor vehicle in question and having a certificate of title thereto assigned to him by the previous owner therefore had sufficient status or standing in relation to the motor vehicle to raise the question of unlawful seizure and search of it, although he had not yet perfected his legal title thereto; that upon the defendant's being questioned by a Deputy Sheriff, the defendant stated enough to cause a reasonable belief by the Sheriff that said motor vehicle was used by the defendant in connection with the commission of the murder for which he was arrested and might well furnish some evidence of his guilt; that the seizure of said motor vehicle by the Sheriff was without trespass upon the curtilage of the defendant.

Therefore, it is the conclusion of the Court that the seizure of the motor vehicle was not unreasonable; that the search of it thereafter had does not violate either the 4th Amendment of the Constitution of the United States, nor Article I, Section 14 of the Constitution of the State of Ohio, nor any statute.

It is therefore ordered that said motion to suppress the evidence herein be and the same is hereby overruled. Exceptions of the defendant noted.

JOURNAL ENTRY OF COMMON PLEAS COURT
OVERRULING STATE'S MOTION TO AMEND THE INDICTMENT
(Dated: February 4, 1965)

This cause came on for trial February 4, 1965, at 9:15 o'clock

LAW OFFICES OF NAZOR & NAZOR

A.M., pursuant to order of adjournment and then came Joseph E. Mahoney, Prosecuting Attorney, Charles M. Diamond, and Francis A. Frackette, Assistant Prosecuting Attorneys, on behalf of the State of Ohio, the defendant, Robert LeRoy Pruett being brought into court in the custody of the Sheriff and being represented in court by his counsel, Howard M. Nazor and Gordon L. Nazor; and also came the panel of jurors heretofore sworn and the two alternate jurors.

Whereupon the State moved to amend the indictment herein by adding the words, "or attempting to perpetrate a rape" after the words, "while in the perpetration of a rape" and said motion was argued and submitted. Upon consideration, said motion to amend is hereby overruled and the trial continues.

THAT PORTION OF JOURNAL ENTRY SUSTAINING
MOTION OF STATE TO AMEND INDICTMENT
(Dated: February 11, 1965)

Upon motion of counsel for the state, over objection of counsel for the defense, the indictment herein was thereupon amended by inserting therein after the words "in the perpetration of a rape" the words "or attempting to perpetrate a rape" so that the operative words of said indictment then provided as follows, omitting the formal parts thereof: "That one Robert LeRoy Pruett on or about the 15th day of September...1964, with force and arms in said County of Ashtabula and State of Ohio, did unlawfully, purposely, and while in the perpetration of a rape, or attempting to perpetrate a rape, kill Susan Osborne; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio..."

VERDICT--GUILTY
IN COMMON PLEAS COURT
(Dated: February 24, 1965)

We, the Jury in this case, duly impaneled and sworn and affirmed, find the Defendant, Robert LeRoy Pruett, Guilty of Murder in the First Degree,

LAW OFFICES OF NAZOR & NAZOR

in manner and form as he stands charged in the Indictment.

(Signed)
Jean W. Maurice
Mary E. Augustine
James Finlayson
Winifred C. Bartko
Christine M. Colucci
Mildred E. Nielsen
Barbara C. Rhodes
Gloria J. Svec
James E. Gillespie
John J. Janda
Vivian B. Hall
Doris M. Glaus

James Finlayson
Foreman

SENTENCE ON VERDICT OF MURDER IN FIRST DEGREE
(Dated: March 27, 1965)

The defendant herein, Robert LeRoy Pruett, heretofore having been convicted of murder in the first degree in violation of R. C. 2901.01 was this day brought into open court in custody of the Sheriff and informed by the Court of the verdict of the Jury and inquired of if he had anything to say why judgment should not be pronounced against him and showing no good and sufficient cause why judgment should not be pronounced;

It is therefore considered and adjudged by the Court

That the defendant, Robert LeRoy Pruett, on the 18th day of August, 1965, and before the hour of sunrise of said day, within the walls of the Ohio penitentiary at Columbus, Ohio, be electrocuted by causing a current of electricity of sufficient intensity to cause death to pass through the body of said defendant, the application of such current to be continued until the said defendant is dead; and that the defendant be taken hence to the jail of Ashtabula County, and that within the next thirty days the Sheriff of Ashtabula County convey the said defendant, Robert LeRoy Pruett, to the Ohio penitentiary and deliver him to the warden thereof, and that at the time and place herein named the said warden cause a current of electricity of sufficient intensity to cause death, to pass through the body of the said defendant, Robert LeRoy Pruett, the application of such current to be continued until said defendant, Robert LeRoy Pruett, is dead; that the said defendant, Robert LeRoy Pruett, pay the costs of this prosecution and exe-

LAW OFFICES OF NAZOR & NAZOR

cution is awarded.

JOURNAL ENTRY OF COMMON PLEAS COURT
OVERRULING MOTION FOR NEW TRIAL
(Dated: March 27, 1965)

This cause came on to be heard on the 17th day of March, 1965, the defendant, Robert LeRoy Pruett, being present in open court and represented by counsel of record, and same was argued and submitted upon only certain of the grounds set forth in the Motion for New Trial, that is:

1. Misconduct of the jury.

2. Abuse of discretion by the Court in sustaining objection to the introduction of the evidence offered by the defense on surrebuttal; and overruling objection of the defendant to the introduction of certain photographs of the body at the scene of the crime.

3. Overruling prior to trial the Motion of the defendant to Suppress Evidence.

4. That the verdict is contrary to law.

Thereupon, this cause was continued to March 27, 1965, at 9:30 A.M. for ruling upon the Motion for New Trial.

On this 27th day of March, 1965, the defendant again appearing in open court with counsel and the State of Ohio appearing by Joseph E. Mahoney, Prosecuting Attorney, and Charles M. Diamond and Francis A. Varckette, Assistant Prosecuting Attorneys, and after careful and due consideration of said Motion, same is hereby overruled in accordance with the Court's written opinion on file. Exceptions for the defendant noted.

JOURNAL ENTRY OF THE COURT OF APPEALS.
(Filed June 23, 1967)

At a Term of the Court of Appeals, Seventh Appellate District, within and for the County of Ashtabula, and State of Ohio, begun and held in the Common Pleas Courtroom at Jefferson, Ohio, on the 23rd day of March, 1966, before the Hon. Nils P. Johnson, the Hon. George M. Jones and the Hon.

LAW OFFICES OF NAZOR & NAZOR

John J. Lynch, Judges, among other proceedings then and there had by and before said Court, as appears by its Docket, is the following to-wit:

State of Ohio, Plaintiff-Appellee, vs. Robert LeRoy Pruett, Defendant-Appellant, May 19, 1965, No. 598. This cause came on to be heard upon the bill of exceptions, the original papers and pleadings in the Court of Common Pleas of Ashtabula County, Ohio, and was argued by counsel.

On consideration whereof, of all the assignments of error the Court finds that there is no error prejudicial to the defendant-appellant apparent on the record, in said proceedings and judgment, and that, in its opinion, substantial justice has been done to the Party complaining, as shown by the record of the proceedings, and the judgment under review.

IT IS, THEREFORE, CONSIDERED BY THE COURT, that the judgement aforesaid be, and the same hereby is affirmed, and that the plaintiff-appellee recover from the defendant-appellant its costs herein expended, taxes at $_____.

That a Special Mandate be sent to the Court of Common Pleas of Ashtabula County, to carry this judgment and costs into execution, and it being made to appear to this Court that the day on which the said Robert LeRoy Pruett was, by said Court of Common Pleas, duly sentenced to be electrocuted, to-wit: the 18th day of August, 1965, is now past, and pending proceedings of this Court, stay of execution was granted to said Robert LeRoy Pruett, until finally disposed of by this Court, and until further order.

This Court proceeding as required by O.R.C. 2953.07, to appoint a day for the carrying of said sentence into execution, it is ordered and adjudged that said sentence of death by electrocution, pronounced and passed upon said Robert LeRoy Pruett, by said Court of Common Pleas of Ashtabula County, Ohio, be carried into execution by the Warden of the Ohio Penitentiary on the _____ day of _____, 1967, in accordance with the provisions of the Statute in such case made and provided, and that said

LAW OFFICES OF NAZOR & NAZOR

Warden forthwith make due return thereof to the Clerk of the Court of Common Pleas of Ashtabula County, Ohio.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a copy of this entry be certified to the Clerk of the Court of Common Pleas of Ashtabula County, for entry, and the defendant-appellant, Robert LeRoy Pruett, being now by order of this Court in the custody of the Warden of the Ohio Penitentiary, it is further ordered that a copy of this Entry and Warrant be duly certified to said Warden.

To all of which holdings, orders and judgment, the defendant-appellant, Robert LeRoy Pruett, excepts.

LAW OFFICES OF NAZOR & NAZOR

STATE OF OHIO, ASHTABULA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
PLAINTIFF-APPELLEE,	)	OPINION
-vs-	)	Case No. 598
ROBERT LeROY PRUETT,	)	
DEFENDANT-APPELLANT.	)	

APPEARANCES.

Joseph E. Mahoney, Prosecuting Attorney, Jefferson, Ohio, for Plaintiff-Appellee.

Nazor & Nazor, Ashtabula, Ohio, for Defendant-Appellant.

Hon. Nils P. Johnson,
Hon. George M. Jones,
Hon. John J. Lynch, JJ.

Dated: February 6, 1967

Grace Marten,
Court of Appeals Reporter,
Mahoning County Courthouse,
Youngstown, Ohio.

JONES, J.

Appellant, Robert Leroy Pruett, hereinafter referred to as defendant, was indicted by the Grand Jury of Ashtabula County (September 1964 term), for first degree murder for the killing of Susan Osborne while in the commission of rape. The indictment was brought under and by virtue of R. C. 2901.01. During the course of the jury trial the Court permitted the prosecutor to amend the indictment by interlineating after the words "in the perpetration of rape" the words "or attempting to perpetrate a rape". This was done pursuant to Revised Code Section 2941.30.

The case came on for trial February 1, 1965. It was concluded on February 23, 1965. The jury returned a verdict of guilty of murder in the first degree without a recommendation of mercy.

Motion for new trial was duly filed, argued and overruled. The sentence and judgment is now before this Court for review. Execution of the sentence has been suspended, and defendant is in the Ohio Penitentiary pending disposition of his appeal.

It appears from the evidence that Pruett, a married man, lived in Conneaut, Ohio, at the time of the crime. The Pruetts had no children at the time, but there was some indication that Mrs. Pruett was pregnant. Pruett

was attending the Manpower Training School in Ashtabula, but was otherwise unemployed. Shortly prior to September 5, 1964, defendant first met Susan Osborne, who was then seventeen years of age, single, and who lived with her mother in Conneaut. On the night of September 14, 1964, the defendant, a friend named Balcom, and defendant's wife made the rounds of a few beer gardens. While on these rounds, they met Susan Osborne. Eventually, about midnight, defendant took his wife home and then took Balcom home to Ashtabula. Susan Osborne accompanied Balcom and Pruett from Conneaut to Ashtabula. Balcom was dropped off in his neighborhood in Ashtabula, and Pruett headed out with Susan Osborne in the Ford auto being used by Pruett that evening. This was the last time that anyone, other than Pruett, saw Susan alive. This was in the early hours of September 15, 1964. The only testimony available as to what happened to Susan is Pruett's. Pruett claimed at the trial that the two had an argument while seated in the auto and waiting for a light to change on Lake Avenue in Ashtabula; that Susan opened the door and got out of the car; that due to the traffic standing behind him he drove on and lost track of Susan; that he could not successfully follow her; that he drove around a bit looking for Susan, did not find her, and that he then headed for home in Conneaut, arriving there about 1:30 a.m.

On Saturday, September 19, 1964, Susan Osborne's

nude body was found in some weeds lying about one hundred feet from Lake Road in Ashtabula Township, in an area which can be reached by a lane leading south off Lake Road. The victim had a puncture wound in the chest and had been brutally beaten about the face and neck.

Defendant has made twenty assignments of error. Counsel specifically argued ten of the errors assigned, without abandoning the others, but claiming that some counts overlap in the assignment.

Defendant first claims irregularity in the proceedings of the trial court, (1) in permitting an amendment to the indictment, and (2) an abuse of discretion on the part of the trial court in refusing to grant defendant's request for a separation of witnesses at the hearing on the motion for a new trial.

First, as to the amendment to the indictment, defendant claims an additional charge, a new crime, has been added to the indictment. It can hardly be said that there has been a change in the identity of the crime. This is so irrespective of the fact that defendant claims that an actual rape had not been proved. Revised Code Section 2941.30 grants a trial court authority to permit an amendment to an indictment in form or substance, provided only that there are no changes in the name or identity of the crime.

Revised Code Section 2941.30, provides in part:-

> "The court may at any time before, during or after a trial amend the indictment, information, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. * * *."

After close study we find no change in the name or identity of the crime. This assignment is not well taken. (See Bryant v. State of Ohio, 48 Ohio App. 208, and State v. Holt, 59 Ohio App. 309. The trial judge in the Bryant case had the same problem with murder and robbery, and permitted the change to "while attempting to commit a robbery").

As to the second contended irregularity, we are of the opinion that the trial judge did not abuse his discretion in not ordering a separation of witnesses during the hearing for a new trial. We hold this after a careful review of the testimony. The witnesses were jurors, some of whom had sat on the case and others who were on the venire but had been dismissed. Defendant contended at the hearing that there had been misconduct on the part of one of the jurors in response to a question put to that juror during voir dire. The judge properly considered the nature of the changes and rightfully permitted the juror-witnesses to be present at the hearing.

Defendant next assigned as error the prejudicial admission into evidence the testimony of officer Roach.

This, he claims, denied him the protection afforded him by the Constitution of Ohio and the Constitution of the United States with amendments. The facts giving rise to this issue do not seem to be in dispute. However, there is a disagreement between counsel for defendant and the trial court as to the applicability of some recent United States Supreme Court decisions and at least one Ohio Supreme Court decision to these facts. The police authorities learned from Balcom that Pruett had been with Susan Osborne, and apparently was the last to see Susan alive, on September 15th. Detective Roach of the Sheriff's Department testified at the trial that he had gone to Pruett's house on the 20th and had found Pruett home. Roach was accompanied by some other officers. Pruett was asked to go with the officers to the Ashtabula City Police Department. Pruett went voluntarily. Not much else was said at the Pruett house or on the way to the station. At the station, the group went to the basement, and then Pruett was taken into the police locker room by Roach. Roach then told Pruett that he knew that Pruett had been in the company of Susan Osborne on the 14th and 15th, that Susan Osborne had met with death, and that the crime was terrible. He asked Pruett if he wanted to talk, but said "that he didn't have to say anything to me until he got an attorney and he could call whoever he wanted for help." Following this Roach testified that Pruett told him that he had taken the girl to the place where the body was

found. Pruett then said several times "I didn't do it". There followed some disputed testimony as to the conversation between Pruett and Officer Roach in the Ashtabula City Police Station. At least the defendant and the state do agree that Roach did discuss with Pruett degrees of murder and punishments. This has led counsel for defendant to point out that an arrest had been made under the Henry Rule (Henry v. U. S., 4 L. Ed. (2d) 136). "An arrest is made the moment a man's movements are restricted and not when a formal arrest is made". Defendant argues that Pruett's movements had been restricted prior to this point, and, according to the Escobedo Rule (Escobedo v. Illinois, 378 U.S. 478), the process had shifted from being investigatory to being accusatory, and since the adversary system was then in process, the accused had to be afforded the right to consult with counsel. The facts clearly show that under the Henry Rule, Pruett had not been under technical arrest or otherwise. His movements had not been restricted, according to his own testimony. Escobedo is not applicable as Detective Roach advised Pruett that he could have an attorney, and Pruett could remain silent until then. Also, we distinguish Alexander v. Green, 2 Ohio St. (2nd) 231. The Green case turns on an arrest; Wong Sun (Wong Sun v. U. S., 371 U. S. 471) and the subsequent line of cases are distinguishable upon the facts. We are not involved with a verbal confession following an

unlawful arrest.

In the instant case there was no confession. Officer Roach was investigating a murder and was talking to Pruett, whom Blacom had last seen with the victim. Pruett's movements were not restricted, by his own testimony. The courts are merely trying to do away with improper police work and investigation that results in the deprivation of constitutional guarantees. They are not eliminating all investigation. The guide lines are most restrictive but not an abolition of all investigations. We conclude that the police work in this case must be commended.

The defendant raises as error the seizure and search of the Ford auto used by the Pruetts, Balcom and Susan Osborne. The trial court held that the seizure of the auto was valid as a seizure of an "instrumentality used in the commission of the crime". We concur with the trial court's reasoning, found beginning on page 151 of Volume 1 of the Bill of Exceptions. There is no need for further discussion on this point. This assignment of error is not well taken. (See also Hemmis v. State, 129 N. W. (2d) 209). Furthermore, the record indicates to this Court's satisfaction that the vehicle was seized incidental to a lawful arrest and, therefore, no search warrant was needed.

The twelfth assignment of error states that the verdict is not sustained by sufficient evidence; that the

court shall consider in this assignment whether or not the evidence shown the defendant guilty of first degree murder as found by the jury, and if not, whether the evidence supports a finding of guilty of a lesser degree, or of a lesser crime included in the charge. We have done as requested. This error, along with the others, has required hours of reading, re-reading and thought. So it is not lightly that we hold that there is sufficient evidence on each element of the crime to support a guilty verdict. A recounting of over 1,300 pages of testimony to support this finding is unwarranted. We conclude that the evidence was sufficient and proper to support the verdict of the jury. We urge the reading of the trial court's splendid, learned and detailed opinion, dated March 27, 1965. It is excellently done and most thorough. It was great help to this court, and will be to other reviewing courts.

All of the errors assigned have been considered. Defendant had the finest professional representation. We commend Attorneys Howard and Gordon Nazor. Defendant had a fair trial as constitutionally guaranteed to him. Thus, finding no error in the record prejudicial to the appellant, we must affirm the judgment and sentence of the trial court.

Judgment affirmed.

Johnson, P. J., Concurs.
Lynch, J., Concurs. See concurring opinion.

APPROVED:

JUDGE.

LYNCH, J., CONCURRING.

I concur in the majority opinion; however, this case presents a difficult constitutional question on search and seizure which I will discuss in detail.

In this case the evidence admitted into the trial of the case is sufficient to establish the guilt of defendant. However, the assignments of error of defendant that present the most difficulty in deciding this appeal is whether certain crucial matters admitted as evidence in this case were inadmissible as violating the constitutional rights of defendant because of recent United States Supreme Court decisions. If the admission into evidence of such matters violated the constitutional rights of defendant, the conviction of defendant must be reversed.

The assignment of error which I will discuss is 6(B), which is as follows: Was the motor vehicle of the defendant-appellant illegally searched and seized, no search warrant for same having been issued, and the seizure and search not being contemporaneous as to time and place with the arrest of the defendant?

The body of the victim was found on Saturday, September 19, 1964. The next day, which was a Sunday, Detective Sergeant Harold S. Roach of the Ashtabula County Sheriff's Department in the course of his investigation of this crime, asked the defendant to come to the Ashtabula

City Police Department for interrogation, and defendant went voluntarily. Officer Roach testified that during the course of the interrogation, which occurred shortly before noon, defendant admitted driving the victim to the scene of the crime in defendant's automobile, that he "made a couple of passes at her and she got out of the passenger side of the car", that defendant got out the same side and "an argument started", but that defendant said repeatedly "I didn't do it". (R. 448-449).

Officer Roach then placed defendant under arrest and took him to Jefferson, the county seat of Ashtabula County. Sheriff Tom Fasula was present when officer Roach and the defendant arrived at the County Jail, and Officer Roach discussed his interrogation of defendant with Sheriff Fasula. Sheriff Fasula then ordered defendant's automobile impounded. A deputy sheriff called Marrison Motors to go to Ashtabula to pick up defendant's car about 3:00 p.m. Defendant's car was located parked in the rear of the residence at 621 W. 38th Street, Ashtabula, Ohio. It was picked up by John W. Marrison pursuant to the order from Sheriff Fasula, and was taken to Marrison's garage.

On the following day, which was September 21, 1964, Officer Roach examined defendant's automobile at Marrison's garage and noticed a discoloration on the front seat. Officer Roach removed the part of the front seat upon which this discoloration was located (R. 485-487). This was sent to the Federal Bureau of Investigation Laboratory

which determined that the stain on defendant's front seat cover was human blood belonging to Group B, which was the same as the victim (R. 570). Officer Roach also found a stain on the grill of defendant's car, which was determined by the Federal Bureau of Investigation Laboratory to be human blood, but there was not enough blood within the smear to determine the type (R. 491, 569).

This issue, then, is whether, under the facts of this case, the seizure and search of defendant's automobile without a search warrant violated defendant's constitutional rights guaranteed under the Fourth Amendment of the United States Constitution and under Section 14 of Article I of the Ohio Constitution. Specifically, was the seizure and search of defendant's automobile without a search warrant "an unreasonable search and seizure" as prohibited by these constitutional provisions.

This writer has had five years experience in law enforcement as a special agent with the Federal Bureau of Investigation and as special agent with the Counter-Intelligence Corps of the United States Army. From his experience, this writer knows that the law enforcement officers did in this case what has been generally accepted in law enforcement circles as legally permissible for a great many years. However, the United States Supreme Court has ruled that certain procedures of state law enforcement officers concerning search and seizure violated the constitutional

rights of the accused, and have prohibited the use of evidence produced as a result of such illegal search and seizure; therefore, existing law enforcement procedures in the investigation of crime and the detection of the perpetrators of crime must be examined in the light of these decisions.

It has been generally accepted by law enforcement officers that when a crime has been committed, law enforcement officers have the right and duty to conduct an investigation at the scene of the crime without the necessity of a search warrant, and that this investigation includes a reasonable search of the vicinity of the scene of the crime and the seizure of any evidence that would establish the nature of the crime and the identity of the person who committed the crime.

When a lawful arrest is made at the scene of the crime, it is clear that the law enforcement officers have the right to conduct a search at the scene of the crime and to seize incriminating articles connected with the crime without a search warrant. 47 American Jurisprudence 515, Searches and Seizures, Section 19.

However, when the person who committed the crime has left the scene of the crime when the law enforcement officials have arrived, does the law require a search warrant for the law enforcement officials to investigate the scene of the crime in order for such law enforcement

officers to seize any incriminating article connected with the crime that is within the reasonable vicinity of the scene of the crime?

It would seem that this issue would have been decided by many courts, but this writer has not been able to find any decided case directly in point.

I would hold that when a law enforcement officer has reasonable cause to believe that a felony has been committed, he has the right and duty to investigate the scene of the crime without the necessity of a search warrant; that this investigation includes a reasonable search of the vicinity of the scene of the crime and the seizure of any incriminating articles connected with the crime, and that such a search and seizure does not violate the provisions of the Fourth Amendment of the United States Constitution and Section 14 of Article I of the Ohio Constitution.

The guaranty set out in the various constitutional provisions against search and seizure is designed to prevent violations of private security of person and property and unlawful invasions of the sanctity of the home of the citizens by officers of the law. 47 American Jurisprudence 507, Searches and Seizures, Section 10.

However, when a crime has been committed, a public law has been violated, and there is a public interest in the investigation of the crime and the determination of the identity of the person who perpetrated the crime.

One of the first steps in the investigation of a crime is an examination of the scene of the crime. The writer is unaware of any law enforcement agency that obtains a search warrant as a routine procedure to investigate the scene of a crime. Investigations by law enforcement officers at the scene of a crime without a search warrant have occurred innumerable times in the past and are continuing at the present time. Apparently, this procedure has been generally accepted, because this writer has found no decided case that challenges the search and seizure of evidence in the vicinity of the scene of the crime as an unreasonable search and seizure within the prohibitions of the various constitutional provisions.

It is submitted that the guaranty set out in the constitutional provisions against search and seizure is to protect the general public against invasion of privacy by law enforcement officers, and that these constitutional provisions were never intended to protect those who violate the laws from being prosecuted. The constitutional standard of a search and seizure is "unreasonableness". I would hold that when a crime is committed, the search of the vicinity of the scene of the crime by a law enforcement officer without a warrant is reasonable. It is submitted that to require a search warrant for every such search would not only be unreasonable but an unrealistic and unnecessary burden on effective law enforcement.

In the instant case, there is no issue as to the investigation by the law enforcement officers at the scene of the crime. The problem arises, because the law enforcement officers had reasonable cause to believe that defendant's automobile was used to transport the victim to the scene of the crime, and that the chain of events that directly led to the murder of the victim commenced within defendant's automobile.

If defendant's automobile was left parked at the scene of the crime, defendant would have difficulty to question the right of law enforcement officers to search and to seize it. If this was the situation, I would hold that the law enforcement officers would have the legal right to search and to seize defendant's automobile without a search warrant.

However, defendant had moved his automobile from the scene of the crime. Does this fact create any additional constitutional restriction to its search and seizure?

In this case, the trial court upheld the seizure and search of defendant's automobile without a search warrant as a seizure of "an instrumentality used in the commission of the crime", and the majority opinion concurs with this reasoning. I also concur with this reasoning, but feel that more explanation should be given. The rationale followed by the trial court is supported in the recent case

of Trotter and Harris v. Stephens, 241 F. Supp. 33 (1965), which was decided by a United States District Court in Arkansas, and whose eleventh headnote is as follows:-

> "Search of an automobile, which proved to be vehicle in which rape occurred, without search warrant approximately two hours after lawful arrest was not violative of any federal right, and fruits of search including property of victim were not unlawfully obtained."

The above case was affirmed by the Eighth Circuit United States Court of Appeals in a reported decision entitled Harris v. Stephens, 361 Federal (2d) 888 (1966).

In Hemmis v. State of Wisconsin, 24 Wis. (2d) 346, 129 N. W. (2d) 209, the Supreme Court of Wisconsin held that search of automobile without search warrant was justified under exceptional circumstances including showing that officers had probable cause to believe that automobile was used by one or more persons involved in burglary, and that automobile could be and subsequently was used to effect a flight from scene by one of the participants.

The constitutional restrictions on searching an automobile are an extension of those restricting the search of a private dwelling; however, there is an important difference. A dwelling is static and is not readily moved, but an automobile is by its nature mobile.

I would hold that the same reasons of public policy that I believe permit the search of a dwelling house when a crime has been committed on its premises without

a search warrant would also permit the search and seizure of a motor vehicle without a search warrant when the law enforcement officers have reasonable cause to believe either that a felony has been committed within the motor vehicle or that the motor vehicle was used in the commission of a felony.

I would further hold that the fact that a motor vehicle is moved from the scene of the crime should not affect any constitutional restrictions as to its search and seizure.

In the instant case, no matter where defendant's automobile was driven after it left the scene of the crime, it does not change the fact that the law enforcement officers had reasonable cause to believe that this automobile was used to drive the victim to the scene of the crime, and that the chain of events that led directly to the murder of the victim commenced within this automobile.

I would hold that defendant's automobile was an integral part of the scene of the crime when the crime was committed, and that the fact that defendant detached this automobile as a part of the scene of the crime by driving it from the scene of the crime does not change its character as a part of the scene of the crime, and does not change the effect of the constitutional provisions against an unreasonable search and seizure of this automobile.

In the instant case, defendant was arrested on a

Sunday afternoon in Ashtabula by a deputy sheriff, and had to be transported to Jefferson, the county seat. Defendant did not have his automobile with him, and the automobile remained in Ashtabula. Within a reasonable time after defendant was incarcerated in the Ashtabula County jail, the sheriff ordered the seizure of defendant's automobile.

Defendant contends that a search warrant should have been obtained and probably could show that a search warrant could have been obtained by contacting all the available judges in Ashtabula County at their homes.

Defendant, therefore, contends that the failure of the law enforcement officers to obtain a search warrant made the seizure and search of defendant's automobile "unreasonable" and was a violation of defendant's constitutional rights. As authority for his position, defendant cites the cases of Preston v. United States, 376 U. S. 364, 11 L. Ed. (2d) 777, 84 S. Ct. 881, and State v. Bernius, 177 Ohio St. 155. However, examination of these cases will show that none of them concerned the seizure of an automobile that the law enforcement officer had reasonable cause to believe was used in a specific felony.

Under the circumstances of this case, I concur that the seizure and search of defendant's automobile was reasonable and did not violate defendant's constitutional rights guaranteed under either the Fourth Amendment of the United States Constitution or under Section 14 of Article I

of the Ohio Constitution. I feel that this is true either under the rationale of "an instrumentality used in the commission of the crime", the "exceptional circumstances" enunciated in the case of Hemmis v. State, or the "scene of crime" investigation by law enforcement officers that I have advanced in this opinion.

Johnson, J., Concurs.

APPROVED:

JUDGE.

CONSTITUTION OF THE UNITED STATES:

AMENDMENT IV - SEARCHES AND SEIZURES. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT VI - RIGHTS OF ACCUSED. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

AMENDMENT XIV - RIGHTS OF CITIZENS. Section 1.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

LAW OFFICES OF NAZOR & NAZOR

OHIO REVISED CODE, Section 2901.01. Murder in the first degree. (GC Sections 12400, 12399).

No person shall purposely, and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery, or burglary, kill another.

Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life.

Murder in the first degree is a capital crime under Sections 9 and 10 of Article 1, Ohio Constitution.

OHIO REVISED CODE, Section 2941.30. Amending an indictment. (GC Section 13437-29).

The court may at any time before, during, or after a trial amend the indictment, information, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment or information or to cure a variance between the indictment or information and the proof, the accused is entitled to a discharge of the jury on his motion, if a jury has been impaneled, and to a reasonable continuance of the cause, unless it clearly appears from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that his rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. In case a jury is discharged from further consideration of a

LAW OFFICES OF NAZOR & NAZOR

case under this section, the accused was not in jeopardy. No action of the court in refusing a continuance or postponement under this section is reviewable except after motion to and refusal by the trial court to grant a new trial therefor, and no appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court finds that the accused was prejudiced in his defense or that a failure of justice resulted.

OHIO REVISED CODE, Section 2945.10. Order of proceedings of trial (GC Section 13442-8).

The trial of an issue upon an indictment or information shall proceed before the trial court or jury as follows:

(A) Counsel for the state must first state the case for the prosecution, and may briefly state the evidence by which he expects to sustain it.

(B) The defendant or his counsel must then state his defense, and may briefly state the evidence which he expects to offer in support of it.

(C) The state must first produce its evidence and the defendant shall then produce his evidence.

(D) The state will then be confined to rebutting evidence, but the court, for good reason, in furtherance of justice, may permit evidence to be offered by either side out of its order.

(E) When the evidence is concluded, either party may request instructions to the jury on the points of law, which instructions shall be reduced to writing if either party requests it.

(F) When the evidence is concluded, unless the case is submitted without argument, the counsel for the state shall commence, the defendant or his counsel follow, and the counsel for the state conclude the argument to the jury.

(G) The court, after the argument is concluded and before proceeding with other business, shall forthwith charge the jury. Such charge shall be reduced to writing by the court if either party requests it before the argument to the jury is commenced. Such charge, or other charge or instruction provided for in this section, when so written and given, shall not be orally

LAW OFFICES OF NAZOR & NAZOR

qualified, modified, or explained to the jury by the court. Written charges and instructions shall be taken by the jury in their retirement and returned with their verdict into court and remain on file with the papers of the case.

The court may deviate from the order of proceedings listed in this section.

OHIO REVISED CODE, Section 2933.23. Affidavit for search warrant. (GC Section 13430-3)

A warrant for search shall not be issued until there is filed with the judge or magistrate an affidavit particularly describing the house or place to be searched, the person to be seized, the things to be searched for and seized, and alleging substantially the offense in relation thereto, and that the complainant believes and has good cause to believe that such things are there concealed, and he shall state the facts upon which such belief is based. The judge or magistrate may demand other and further evidence before issuing such warrant.

LAW OFFICES OF NAZOR & NAZOR

~~TAFT C.J.~~

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS OF ASHTABULA COUNTY

NO. 41163

STATE OF OHIO

Plaintiff-Appellee

vs.

ROBERT LeROY PRUETT

Defendant-Appellant

MEMORANDUM OPPOSING JURISDICTION

Joseph E. Mahoney
Prosecuting Attorney of Ashtabula County
Ashtabula County Courthouse
Jefferson, Ohio
Attorney for Plaintiff-Appellee

NAZOR & NAZOR
Howard M. Nazor
Gordon L. Nazor
Gillmore Building
Ashtabula, Ohio
Attorneys for Defendant-Appellant

FILED
NOV 29 1967
SUPREME COURT OF OHIO
THOMAS J. MORGAN, Clerk

TABLE OF CONTENTS

Statement of Facts---------- 1

Questions of Law Presented---------- 11

Reasons Why Case Does Not Contain Issues of Law of Public or Great General Interest and Substantial Constitutional Questions---------- 13

(1) The validity of seizure and search of defendant's motor vehicle should be determined by the totality of the circumstances surrounding the facts of the case itself. A search and seizure made substantially contemporaneously with the time and place of arrest is not in violation of the 4th Amendment of the United States Constitution which provides unreasonable searches and seizures---------- 13

(2) Where the investigation in a criminal case involves a general inquiry into an unsolved crime and has not begun to focus on a particular suspect, any statement obtained from a person being questioned may be used against him at a criminal trial, as said interrogation and said resulting statement does not constitute a violation of the 6th Amendment to the Federal Constitution, and therefore such admission of said evidence constitutes no reversible error---------- 20

(3) Mere indication by prospective juror during voir dire, that he had discussed the case pro and con prior to trial, does not deprive defendant of a fair and impartial trial---------- 25

(4) An indictment for murder may be amended, under authority of Section 2941.30 Revised Code by insertion of the words "or attempting to perpetrate a rape" immediately following the words "in the perpetration of a rape"; such amendment not being a change in the name or identity of the crime charged and not prejudicing the accused in his defense---------- 29

(5) Where, in the trial of a criminal case, evidence is introduced in rebuttal by the State to meet a claim or theory of the defense, the fact that such evidence also tends to prove some element or elements of the State's case in chief does not make such testimony inadmissible, nor is the State deprived of the benefit thereof as tending to prove the commission of the offense alleged in the in-

dictment. The admission of evidence out of some abuse of such discretion appears, when taken in connection with all the evidence in the case, such as to show that a party was prevented from having a fair trial, a verdict will not be disturbed on that ground. See Holt v. The State of Ohio, 107 O.S. 307---------- 32

CONCLUSION---------- 55

APPENDIX A.----------A-1

TABLE OF AUTHORITIES

CASES

Stoner v. California, 376 U.S. 483, 11 L ed 2d 856---------- 14
Preston v. U.S., 376 U.S. 364, 11 L ed 777---------- 14
State v. Bernius, 177 O.S. 155---------- 14
Go-Bart Importing Co. v. U.S., 344, 357---------- 14
U.S. v. Rabinowitz, 339 U.W. 57, 94 L ed 653---------- 15
People v. Thayer, 408 P. 2d 108 (1965)---------- 15
People v. Carroll, 238 N.Y.S. 2d 640 (1963)---------- 15
United States v. Ventresca, 380 U.S. 102 13 L ed 2d 684------ 15
Carroll v. U.S., 69 L ed 543, 553---------- 15
Warden, Maryland Penitentiary v. Bennie Joe Hayden, 18 L ed 2d 782---------- 16
State ex rel. Sadler v. District Court, 70 Mont. 378, 225 P. 1000---------- 20
State v. Milam, 108 Ohio App. 254, 268---------- 21
Henry v. U.S., 4 L ed 2d 136---------- 21
Escabedo v. Illinois, 378 U.S. 478 (1964)---------- 22
Mallory v. U.S., 354 U.S. 449---------- 22
Alexander v. Green, 2 O.S. (2d) 231, 31 O.O. (2d) 231-------- 24
People v. Dorado, 394 P. (2d) 952, 40 Cal. Rptr. 264--------- 24
Farrer v. State, 2 O.S. 54---------- 26
Kent v. State, 42 O.S. 426---------- 26
Schwindt v. Graeff, 109 O.S. 404---------- 26
Wicker v. Cleveland, 150 O.S. 434---------- 26
State v. Miles, 59 NE 2d 39---------- 26
State v. Ferguson, 182 SW 2d 38---------- 27
Huddleston v. State, 64 Southern 2d 90 (ala.)---------- 27
Gossett V. State, 48 SE 2d 71 (Ga.)---------- 27
State v. Finnell, 280 SW 2d 110 (Mo.)---------- 27
Lindsey v. State, 25 SW 2d 533 (Tenn.)---------- 27
People v. Evans, 246 Pac. 2d 636 (Cal.)---------- 27
State v. Oliver, 192 Southern 725 (La.)---------- 27
State v. Ingersoll, 292 Pac. 250 (Mont.)---------- 27
Locicero v. State, 14 Abs. 109---------- 27
Bryant v. State of Ohio, 48 App. 208, Hamilton County, 1933--- 29
State v. Holt, 59 O. App. 309-Court of Appeal for Franklin County, (1938)---------- 30
Holt v. State of Ohio, 107 O.S. 307----------32, 33
Itskin v. State, 51 App. 211 (1953)---------- 32
State v. Lett, 106 App. 285 (1958)---------- 32

CONSTITUTION

Constitution of the United States:
Fourth Amendment----------13, 16
Sixth Amendment---------- 20

STATUTES

Ohio Revised Code:
Section 2941.30----------11, 29, 30

STATEMENT OF FACTS

This case is before the Court on an appeal on questions of law taken by the defendant-appellant from a verdict of a jury of guilty of first degree murder without a recommendation of mercy and the Trial Court's refusal to grant a new trial. The defendant-appellant will hereinafter be referred to as defendant, and the plaintiff-appellee will hereinafter be referred to as plaintiff. All references to the record are to Volume 2 unless otherwise noted.

The defendant was charged by the grand jury of Ashtabula County at its September, 1964 term with murder in the first degree for the killing of Susan Osborne, while in the perpetration of a rape or attempting to perpetrate a rape on or about September 15, 1964. As is stated in the defendant's brief herein the words "or attempt to perpetrate a rape" were added to the indictment by interlineation by order of the Court (R. 590-591).

On September 19, 1964, the body of a dead girl, later to be identified as the victim, Susan Osborne, was discovered by a young boy and his father in a wooded area South of Lake Road near Lake Erie in Ashtabula County. The body was near a lane which traveled South from Lake Road to a dead end. The body was approximately 100 feet from Lake Road and approximately 15 feet from the lane, and because of the vegetation overgrowth, it could not be seen from the lane or from Lake Road.

Upon the discovery of the body of the victim the police were summoned, the area was roped off, the Coroner was summoned, and photographs were taken. In all of the preliminary testimony

regarding the finding of the body, all witnesses stated that the body was not touched or moved in any way until after the photographs had been taken. The photographs which were admitted into evidence show the difficulty in observing the body from the lane, the condition of the terrain in which the body was found, the position of the body when found, the condition of the body when found, the clothing found near the body, and the condition of the various injured and identifying parts of the body. These photographs showed that the body was nude, lying upon its back, that the legs of the victim were spread, and that the body contained a puncture wound in the upper chest and severe damage to the face. Maggots had contaminated the open cavities of the body.

The body was examined on the scene by the Coroner, Dr. John Higerd. He found the body to be in the condition as above described and found a bruise over the left hip, a bruise over the right hip, and streaks of blood running from the wound in the chest over the upper portion of the chest and the right shoulder. (R.102, 112). Among the clothing found near the body was a blouse and a brassiere. The blouse had a small cut in it which corresponded with the wound in the chest of the victim. Both the blouse and the brassiere were encrusted with blood. (R. 123, 125). Death was caused by lack of oxygen due to the damage to the face and throat and the clotting of blood. (R. 146). The victim lived at least 45 minutes after the injuries were inflicted. (R. 149). The victim died at Whitman's Creek, North Kingsville in Ashtabula County, Ohio where the body was found (R. 149) between 4 and 5 days prior thereto. (R. 149).

At the County Morgue in Ashtabula an autopsy was performed on the body of the victim by Dr. Jason Dixon on the evening of September 19, 1964, commencing at about 9:45 P.M. (R. 198). Dr. Dixon is a pathologist at the hospital and had performed at that time approximately 1600 autopsies. (R. 197). Dr. Dixon found in the vagina of the victim a substance which contained an extremely high acid phosphatase content. (R. 208). Dr. Dixon testified that semen has one of the highest concentrations of acid phosphatase and that there was no way that acid phosphatase would be found in the vaginal tract other than by artificial insemination or normal sexual intercourse. (R. 208, 209). The doctor testified that the victim had had intercourse within 12 hours of the time of death. (R. 210). The doctor testified that he found no spermatozoa and that the absence of spermatozoa could not exclude sexual intercourse. (R. 206). Dr. Dixon testified that in his opinion the decedent had died approximately 4 days prior to the autopsy. (R. 211).

The victim's mother, Mrs. Rantamaki, testified that the victim had completed her menstrual period on Monday, September 14, 1964 (R. 176). Normal menstruation would have eliminated any evidence of intercourse had prior thereto. The blood encrusted upon the blouse of the decedent at the hole in the blouse which corresponded with the wound in her chest, was found upon an examination at the FBI Laboratory in Washington (R. 558) to be type B, the same as that of the decedent. The blood on the brassiere of the decedent was found to be human blood but it could not be typed. (R. 565).

The defendant was 26 years old at the time he committed this offense. He had married his 17 year old wife in Las Vegas a few months before coming to Ashtabula County to live with his mother-in-law in Conneaut. He and his wife were working in Las Vegas and earning approximately $180.00 a week. (R. 695). They arrived in Conneaut with no employment arrangements. Theylived with the mother-in-law and paid no room or board, other than work performed around the premises. The defendant testified that he had been in jail in Oregon for violating probation and that he had served in the Armed Forces during which time he had 3 court-martials and admitted to being AWOL on numerous occasions. (R. 736).

The defendant purchased a 1953 Ford a few weeks prior to September 15, 1964. At the time of purchasing the automobile, he was employed at Manpower Training School in Ashtabula, Ohio. His wife was employed as a baby sitter at the time of the death of the victim in Ashtabula, Ohio. On Thursday, September 10, 1964, the defendant and his wife met the victim and a girl friend of the victim, Ann Kent, who was then known as Ann Shaokel, her maiden name, at or near a tavern in Conneaut. (R. 227). The defendant and his wife, the victim and Ann Kent and two other men purchased some beer and went to a beach near Conneaut where the beer was consumed. At or near midnight on that night the party, with the exception of one of the men, returned to a bar in Conneaut at which the decedent danced with the defendant on two occasions. (R. 231). Defendant purchased drinks for the victim on that evening.

On the night of Monday, September 14, 1964, the defendant and his wife and a man named Norman Balcomb and the deceased made

the round of several bars in Conneaut. During the evening Mrs. Kent saw the defendant on several occasions. The last time that Mrs. Kent saw the defendant and the victim was at about 11:30 P.M. in downtown Conneaut. At the time the defendant and his wife were seated in the front seat in the defendant's 1953 Ford and Balcomb and the deceased were seated in the back seat. The deceased asked Mrs. Kent to accompany them and she refused. (R. 240).

During the course of the evening of September 14, 1964, the defendant stated to Balcomb that he had "got in her pants" regarding the deceased. (R. 287). On the same evening he also told Stanley Pachkowski that he "made" Susan, the deceased. (R. 359).

Some time around midnight on the night of September 14, 1964, the defendant took his wife home and he and Norman Balcomb and the deceased proceeded from Conneaut to Ashtabula. During the course of the evening and ending at or about midnight the deceased had eaten most of two bags of pretzels (R. 925) at a bar and grille. During that time the defendant had made comments regarding the switching of partners. (R. 293). At the time the comments were made, Balcomb was with the decedent and the defendant was with his wife. During the course of the evening Susan Osborne had consumed several drinks as had the defendant and Norman Balcomb. Norman Balcomb attempted to make advances on the deceased in the car on the way to Ashtabula, but was essentially unsuccessful. The defendant left Norman Balcomb out of his automobile near Balcomb's home in Ashtabula on September 15, 1964 at about 12:15 A.M. The deceased got into the front seat of the defendant's car as they left Balcomb.

The defendant's wife testified that the defendant returned home at approximately 1:30 A.M. and that she had never left the house. The testimony was controverted by the rebutal witness, who testified that the wife left the house at about 3:10 A.M. The defendant's wife stated that the defendant told her at about 1:30 A.M. that the deceased had jumped out of defendant's car near the General Hospital in Ashtabula and had not returned to Conneaut with the defendant. However, on the following day when Mrs. Kent went to the defendant's home she was told by the defendant's wife that she and her husband had left the deceased out of the automobile in Conneaut at about 12:00 the night before. (R. 241). The defendant's wife also admitted that she told the police the same story about letting the deceased out in Conneaut. (R. 685). On the same evening of September 15, 1964, the evening of the morning following the murder, defendant and his wife went to the home of Norman Balcomb where they told Balcomb, out of the hearing of other persons present, that Susan was missing, and that if Balcomb was questioned by the police about her being missing, he should tell the police that Mrs. Pruett had come to Ashtabula with Balcomb and Mr. Pruett and that they had left Susan in Conneaut. (R. 307). The defendant had been visibly upset at work at Manpower Institute as testified to by several witnesses on the working day of September 15, 1964, and he had left work from about 10:00 A.M. to 2:00 P.M. on that day.

On September 15, 1964, following the death of the deceased, the defendant had a small cut, not a half inch in length, on the knuckle of his right hand. (R. 405). The following day,

September 15, 1964, the defendant told a working companion, George Temple, that in taking the deceased girl from Conneaut to Ashtabula, his wife had accompanied him. (R. 406).

On Saturday, September 19, 1964, the day that the body of the victim was found, the Pruetts stayed the night in Ashtabula with the Balcombs. The following day the Pruetts moved from Conneaut to an apartment that they had rented in Ashtabula. They moved their belongings in boxes in the 1953 Ford.

Upon determining that Norman Balcomb had been with the deceased on the last evening that she was seen, the police interviewed Balcomb and he advised them that the defendant had been with the deceased after he had left the defendant's vehicle. The officers went to the home in Ashtabula where the Pruetts had moved and asked the defendant to come to the station to talk to them. (R. 444). Defendant voluntarily went with the officers to be questioned. He told his wife that he would return in about two hours after being questiond. (R. 690). The defendant was questioned by Detective Harold Roach at the Ashtabula Police Station. Detective Roach's testimony on the subject commencing at (R. 448) is as follows:

"A I explained to Robert at this time of the investigation that we were working on and that it pertained to the death of a 17 year old girl, known as Susan Osborne, from Conneaut. I told him that I knew that he had been in the presence of this girl and of how terrible this crime is and I asked him if he wanted to talk to me about it and wanted to tell me about it and I advised him that he didn't have to say anything to me until he got an attorney. He could call whoever he wanted for help, but I felt sure if he was involved in this it would be best if he tell me about it."

"Q What did he say to that?"

"A Robert Pruett stood there for quite some time with his head bowed and again I asked him if he had been in the area over

there, the Whitman's Creek area on Lake Road and if he wanted to tell me about it. Well, again he stood silent for, oh, maybe a minute and finally he said, 'Yes, I did drive the girl over there.' He said, 'We went east on Lake Road to Whitman's Creek.' And I said, 'What did you do after you got to Whitman's Creek?' He said, 'I parked on the south side of the road. I turned to the right."

"Q I didn't hear that."

"A He said he turned to the right in this parking area off of Lake Road and I said, 'Well, how did you park, Robert?' 'Well,' he said, 'I turned around in this area.' And then I asked him what direction the car would be when he parked. 'Well,' he said, either the lake or Lake Road, the head of the car, the front of the car.' And I asked him how long he was there and he said, 'I don't know."

"Well, what did you do while you were there,' I asked him. He said, 'We talked and I drank a can of beer.' And I asked him what kind of beer this was and he said, 'Genessee.' I asked him if she drank any beer and he said no. After he drank the beer he said he threw the can out of the driver's side of the car and again I asked him what happened then. And he said, ' I made a couple of passes at her and she got out of the passenger side of the car.' Again I asked him what happened."

He said he slid across the seat and got out the same side. I said, 'Go ahead, what happened then?' He said, 'An argument started."

"About this time a police officer from Conneaut came through the hallway to Robert's right and at this time Robert had his head bowed. This was the position in which he was talking to me and evidently he noticed the officer come around the corner and immediately Robert says, 'I didn't do it.' He repeated it twice.

"At this time I told Robert that I was going to have to arrest him and take him to Jefferson."

"Q This was Sunday now, wasn't it?"

"A Yes sir."

"Q What time was this again?"

"A This was shortly before noon."

On the same day, Sunday, September 20, 1964, Detective Roach returned to the scene of the crime and, thoroughly searched the area. (R. 452). In the search of the entire area, they found only one Genessee beer can and that was located next to the driveway about

25 to 30 feet from where the body of the deceased was found. (R. 452, 453).

On the afternoon of September 20, 1964, the Sheriff was advised that the defendant had a 1953 Ford automobile in which he had driven the deceased to the scene of her death and he ordered the car impounded (R. 463, 464), because "it was an instrumentality in the commission of this crime". (R. 464).

This vehicle could not be located at defendant's residence in Ashtabula, Ohio, however, it was later learned that defendant's wife had requested Balcomb to take this 1953 Ford automobile to Balcomb's residence, which was done. Shortly thereafter, Balcomb called the police and requested that the vehicle be removed from his residence. Thereafter, the vehicle was impounded and was in custody until the time of the trial. Upon a search of the vehicle, on the day following the arrest of Pruett, Detective Roach found a spot on the seat cover and on the grille cover of the car radio. (R. 485 to 487). These spots were later analyzed by a chemist for the Federal Bureau of Investigation, who found each spot to be human blood. The blood on the radio grille could not be typed (R. 569), but the blood on the seat cover was typed B, (R. 579), the same as the deceased.

Regarding the eating of pretzels by the deceased and the time for digesting the same, the record disclosed that the decedent consumed two bags of pretzels between 11:35 P.M. and about midnight. (R. 342). The Coroner testified that it would take approximately two hours for the pretzels to be digested (R. 163) or less, if they had been chewed. (R. 169). Dr. Dixon testified that digestion could have taken place within an hour. (R. 219). The

decedent lived at least 45 minutes after she was attacked. (R. 149).

QUESTIONS OF LAW PRESENTED

(1) The validity of seizure and search of defendant's motor vehicle should be determined by the totality of the circumstances surrounding the facts of the case itself. A search and seizure made substantially contemporaneously with the time and place of arrest is not in violation of the 4th Amendment to the United States Constitution which provides unreasonable searches and seizures.

(2) Where the investigation in a criminal case involves a general inquiry into an unsolved crime and has not begun to focus on a particular suspect, any statement obtained from a person being questioned may be used against him at a criminal trial, as said interrogation and said resulting statement does not constitute a violation of the 6th Amendment to the Federal Constitution, and therefore such admission of said evidence constitutes no reversible error.

(3) Mere indication by prospective juror during voir dire, that he had discussed the case pro and con prior to trial, does not deprive defendant of a fair and impartial trial.

(4) An indictment for murder may be amended, under authority of Section 2941.30 Revised Code by insertion of the words "or attempting to perpetrate a rape" immediately following the words "in the perpetration of a rape"; such amendment not being a change in the name or identity of the crime charged and not prejudicing the accused in his defense.

(5) Where, in the trial of a criminal case, evidence is introduced in rebuttal by the State to meet a claim or theory of

the defense, the fact that such evidence also tends to prove some element or elements of the State's case in chief does not make such testimony inadmissible, nor is the State deprived of the benefit thereof as tending to prove the commission of the offense alleged in the indictment. The admission of evidence out of its order rests in the sound discretion of the Court. Unless some abuse of such discretion appears, when taken in connection with all the evidence in the case, such as to show that a party was prevented from having a fair trial, a verdict will not be disturbed upon that ground. See Holt v. The State of Ohio, 107 O.S. 307.

REASONS WHY CASE DOES NOT CONTAIN ISSUES OF LAW OF PUBLIC OR GREAT GENERAL INTEREST AND SUBSTANTIAL CONSTITUTIONAL QUESTIONS.

(1) The validity of seizure and search of defendant's motor vehicle should be determined by the totality of the circumstances surrounding the facts of the case itself. A search and seizure made substantially contemporaneously with the time and place of arrest is not in violation of the 4th Amendment to the United States Constitution which provides unreasonable searches and seizures.

The defendant claims that the search and seizure of defendant's Ford automobile was unlawful in that it was conducted in violation of the 4th Amendment to the Federal Constitution and sets forth verbatim said Amendment.

The Court's attention is directed to the use of the word, unreasonable, in said Amendment and it hereby submitted on behalf of the plaintiff that the search and seizure herein made was not unreasonable as will be more fully explained hereinafter.

In this case the defendant was requested by police officers to go with them to the Ashtabula City Police Department for questioning concerning the death of one Susan Osborne. At this point the police officers were in the investigatory stage of this investigation with no focus of guilt or involvement in the crime being directed towards the defendant. Defendant voluntarily went to the Station House and believed that he would be returning home shortly because he so advised his wife. The actual arrest of the defendant came only after he made a statement to the police officer concerning his involvement. The defendant's automobile had been moved from his residence to another location, however, the police officers seized same at a time substantially contemporaneously with defendant's arrest, which was on a Sunday afternoon, and searched

the automobile on the following day, and as the evidence indicates, said officers found evidence of blood in the automobile matching that of the victim.

The defendant relies heavily on decisions of the United States Supreme Court, Stoner v. California, 376 U.S. 483, 11 L ed 2d 856; Preston v. U.S., 376 U.S. 364, 11 L ed 777 and State v. Bernius, 177 O.S. 155, however, it should be noted that in the Stoner case the problem involving the Supreme Court was one of consent to search being given by a person other than the occupant of a hotel room and in the Preston case an arrest for vagrancy and a subsequent charge of conspiracy to rob a Federally insured bank, and in the Bernius case the problem involved was an arrest for changing lanes in violation of a city ordinance and a subsequent trial on the charge of having unlawfully in his possession or under his control obscene, lewd or lascivious photographs.

It is hereby submitted that none of the factual situations contained therein are applicable to the present case.

It is noted with interest that in the Preston case, pages 366-367, the Court said,

> "....Common sense dictates, of course, that questions involving searches of motorcars or other things readily moved cannot be treated as identical to the questions arrising out of searches of fixed structures like houses. For this reason, what may be an unreasonable search of a house may be reasonable in the case of a motorcar."

The Supreme Court of the United States and the State Courts have historically held that each case is to be decided on its own facts and circumstances. See Go-Bart Importing Company v. United States, 344, 357.

With regard to the "mere evidence rule" as alluded to by defendant in his brief, it should be noted that in United States v. Rabinowitz, 339 U.S. 57, 94 L ed 653, the Court held that there is a right to search incidental to arrest and that such searches turn upon the reasonableness under the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required. The relevant test is not whether it was reasonable to procure a search warrant, but whether the search was reasonable.

It is unclear as to whether the "mere evidence rule" is a constitutional requirement which is binding on the States. Recently two different states have held the rule inapplicable to the States, while another has limited it to apply only to private papers and books and not to tangible objects such as a pair of shoes. Thus tangible objects could be seized even though they did not fit into the recognized types of seizable items. See People v. Thayer, 408 P. 2d 108 (1965); People v. Carroll, 238 N.Y.S. 2d 640 (1963).

In United States v. Ventresca, 380 U.S. 102 13 L ed 2d 684, the Supreme Court of the United States observed in a footnote in discussing exceptions to search warrants:

> "The exceptions are illustrated by cases in which seizure is impossible except without warrant", Carroll v. United States, 69 L ed 543, 553.... such as a search of a moving object where 'it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality of jurisdiction in which the warrant must be sought."

The most recent pronouncement of the United States Supreme Court on the "mere evidence rule", is contained in Warden,

Maryland Penitentiary v. Bennie Joe Hayden, 18 L ed 2d 782, wherein the Court at page 788 states:

> "The distinction made by some of our cases between seizure of items of evidential value only and seizure of instrumentalities, fruits, or contraband has been criticized by Courts and commentators." The Court of Appeals, however, felt 'obligated to adhere to it'. We, today, reject the distinction as based on premises no longer accepted as rules governing the application of the 4th Amendment."

At page 793 of the Warden case, the Court also states:

> "The rationale most frequently suggested for the rule preventing the seizure of evidence is that 'limitations upon the fruit to be gathered tend to limit the quest itself.' But privacy 'would be just as well served by a restriction on search to the even-numbered days of the month....And it would have the extra advantage of avoiding hair-splitting questions....'. The 'mere evidence' limitations has spawned exceptions so numerous and confusion so great, in fact, that it is questionable whether it affords meaningful protection. But if its rejection does enlarge the area of permissible searches, the intrusions are nevertheless made after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of 'a neutral and detached magistrate....' The Fourth Amendment allows intrusions upon privacy under these circumstances, and there is no viable reason to distinguish intrusions to secure 'mere evidence' from intrusions to secure fruits, instrumentalities, or contraband."

The Trial Court below held that the seizure of the vehicle in question was permissible, because the vehicle was the implement or an instrumentality used in the commission of the crime and the Court's final ruling upon the Motion to Suppress beginning at page 151 of Vol. 1 of the record is as follows:

> THE COURT: At the previous hearing on this issue while no issue was made of it, the matter wasn't raised, technically I doubt if there is any showing in the record that there was even a lawful arrest of the defendant at the time we are considering. That issue wasn't raised.

At the previous hearing also, there was a showing as to why the car was taken, and of course, it was shown without question it wasn't taken until after the arrest. Well regardless, I should say without reviewing the reasons in the testimony as shown previously with reference to the taking of the car, the most that can be said, as I recall -- I'm pretty sure I'm right on this -- as to why the car was taken were two points. It was found the car had fictitious license plates and the Sheriff also testified he ordered it picked up following a conversation with his deputies.

Now on the strength of that showing I ruled that the seizure and subsequent search was unlawful. My reason was this: Not because of the no showing of the arrest -- no contention was made for that -- but.....

MR. H. NAZOR: We admit he was arrested at the time.

THE COURT: There is no question about it, there was no question then made, and there can't be any serious question now made that the arrest at that time was lawful; but admittedly the seizure was after the arrest. It was not commensurate in time with the arrest and at that time there was no showing made as to a plausible reason or excuse for taking the car.

The Sheriff has no right to pick up a motor vehicle parked on private premises because he learns that it has fictitious plates on it. Whether he can take it out on a highway is another point. That is not now to be decided.

Well, it now appears that the reason for taking this car, which probably was the reason the Sheriff referred to but didn't elaborate at the prior hearing, was as Detective Roach has testified, namely, that the defendant told him that he had transported the deceased to the particular place where she was found, in this car.

Now admittedly the seizure with the follow-up examination or search of the car was made with knowledge of that information and, of course, made without a warrant authorizing its search and seizure. So as I see it, the issue is where there is a lawful arrest and probable cause to believe that a motor vehicle has been used in connection with the commission of the crime -- not necessarily the instrumentality alone by means of which the death is caused, but the automobile which the officers believe was used in connection with the commission of the crime -- may the automobile be seized without having to commit an unlawful search to get it, for instance breaking into a garage?

There isn't any question but what under the facts of this case the car was actually seized without committing a trespass as far as this defendant is concerned, unless the officers had no right to make the seizure at all.

As I view it now, the issue really is this. Following a valid arrest of this defendant and his having made the statement to the officer that he did, may they lawfully seize this car thereafter and search it?

Well, as I understand the rule, and even in the light of the latest Supreme Court cases dealing generally with this subject, as I read them -- and I think I have read all that counsel have cited and some besides -- I don't think the rule as previously announced has been abridged by those cases, and the rule long has been announced in many, many cases, many, many annotations, as I understand it, the rule is as follows: "That where a lawful arrest is made, a search of the person and of the place where the arrest is made may be had..." That isn't what we are dealing with right now, of course. "And the officers may seize and hold property so found which they reasonably believe is connected with the crime charged, no search warrant is needed to authorize seizure of such articles."

Now the officers did not take the defendant from the car, so it might well be argued that the officers couldn't take the car, pinned closely to only the language of such a rule; but I believe that is backed up by -- and almost without question -- these cases, many of them in these annotations that I have noted where the officers believe that the car is used in connection with and may bear evidence of the commission of the crime for which the lawful arrest is made, they may make the seizure of the property if they do not have to commit an unlawful search to get it. And in this case there was no unlawful search of any premises to get this car, at least nothing unlawful so far as the defendant is concerned.

If we are to say that the officers can't seize the car when they can do so without committing a breach of the peace, if it is to be said that the officers cannot take in order to produce proof of guilt of the defendant under the circumstances here shown, then in my judgment an entirely new rule will have to first be written. I don't read any of the United States Supreme Court cases that way.

There are many of them dealing with this subject in use of evidentiary matter only; however, on examination I find those to be cases dealing not with the seizure of articles by which proof of the crime for which the arrest has been made -- the proof will be had -- but of some other offense. And by and large those cases hold that if the possession of that other evidentiary article is unlawful and hence the article by reason thereof is contraband, even then it may be used. But if it is not, and if the seizure is made as an evidentiary seizure only, in some other case beyond and different than the one for which the arrest is made, such an article thus seized may not be used. That again is not our situation here.

It is my opinion the seizure of this car under the facts shown was justified and the motion to suppress will be overruled.

MR. H. NAZOR: Are you ruling that our motion to

suppress any evidence taken from the car is overruled too?

THE COURT: Yes sir.

MR. H. NAZOR: Very well.

THE COURT: I think that follows as a matter of course. If the right to seize the car exists, the right to examine it follows and the right to use the results of an examination or search -- call it what you will. And the first issue as I see it, did they have a right to seize the car? I think they did. Therefore, I think they had a right after the lawful seizure, certainly, to examin it.

MR. H. NAZOR: Note an exception.

THE COURT: Certainly. That's all.

MR. MAHONEY: Thank you, Judge.

(Thereupon, the hearing was adjourned.)

(2) Where the investigation in a criminal case involves a general inquiry into an unsolved crime and has not begun to focus on a particular suspect, any statement obtained from a person being questioned may be used against him at a criminal trial, as said interrogation and said resulting statement does not constitute a violation of the 6th Amendment to the Federal Constitution, and therefore such admission of said evidence constitutes no reversible error.

We believe that the defendant must concede that the State is entitled to have the evidence interpreted most favorably to it as the jury verdict was rendered in favor of the State. The testimony of Detective Roach, as it was given, is as follows:

> "I told him that I knew that he had been in the presence of this girl and how terrible this crime is, and I asked him if he wanted to talk to me about it and I advised him that he didn't have to say anything to me until he got an attorney. He could call whoever he wanted for help, but I felt sure if he was involved in this, it would be best if he would tell me about it." (Emphasis added)

Throughout defendant's argument on this point he has contended that he was under arrest at the time his statement was made. The evidence emphatically refutes such contention. There can be no doubt that the defendant expected to be questioned by the police. By his own testimony he had discussed with Norman Balcomb what story would be given to the police when they were questioned. When the police came to the defendant's home to question him, he went voluntarily. This statement is not only supported by the officers involved, but by the testimony of the defendant's wife that he would return in a couple of hours. (R. 690). The officers did not wish to detain the defendant and the defendant did not believe that he was being detained. A succinct and often followed definition of arrest is found in State ex rel. Sadler v. District Court, 70 Mont. 378, 225 P. 1000:

> "To constitute an 'arrest', four requisites are involved: A purpose to take the person into custody of the law, under real or pretended authority and an actual or constructive seizure or detention of his person, so understood by the person arrested."

See also State v. Milam, 108 Ohio App. 254, 268, wherein the above definition was quoted with approval.

The body of the deceased girl had been found the evening before the questioning of the defendant. The defendant's name and address were received from Norman Balcomb who was at that time being questioned at the police station. The purpose of the investigation and the questioning of the defendant was strictly investigative, and at that time had nothing to do with accusation. The statement of Detective Roach to the defendant clearly supports this fact.

After being arrested, while still at the Ashtabula Police Station, the defendant's wife called him. The police permitted the defendant to talk to his wife on the telephone. (R. 690). This act is totally inconsistent with defendant's claim of an inquisition as being held incommunicado.

The well established rule laid down by the United States Supreme Court in Henry v. U.S., 4 L ed 2d, 136, is that:

> "An arrest is made the moment a man's movements are restricted and not when a formal arrest is made."

The defendant here did not believe that his movements were restricted. He told his wife as he left with the officers that he would return in approximately two hours. Detective Roach did not restrict the defendant's movements as he testified that he went to the police station in order to talk to the defendant, and that there was no room available to his knowledge for a discussion, so

they spoke in an open corridor in a locker area at the Ashtabula City Building. The defendant was not under arrest at the time of making the incriminating statements to Detective Roach.

The defendant has cited many familiar and leading cases of the United States Supreme Court and other Courts, which in recent times has had occasion to discuss the fundamental constitutional rights of a prisoner in greater detail than was done in the past. Rather than burden the length of this brief with discussion of each of these cases, we believe it sufficient to examine Escabedo v. Illinois, 378 U.S. 478 (1964) and Mallory v. U.S., 354 U.S. 449. The Escabedo case as cited by the defendant at page 19 of their brief holds "....When its focus is on the accused and its purpose is to elicit a confession", an accused must be permitted to consult with an attorney. In the instant case the accused was advised of his rights to consult with an attorney. He was advised that he could seek any help he desired. Furthermore, he was not an accused. It must be apparent to the Court that at this state, early on a Sunday following the Saturday evening discovering of the body, the police were seeking information, simply investigating the killing. By simple view of the body, they knew that they had a murder.

In the Mallory case, the defendant was arrested on suspicion of rape. The Court said that the arrested person could be booked by the police but thereafter an inquiry, designed to elicit damaging statements to support the arrest, could not be conducted. In the instant case, the defendant, Pruett, was not arrested, nor was an inquiry had to attempt to elicit damaging statements. As

the defendant repeatedly points out, Detective Roach did not even have a witness with him when questioning the defendant, nor was he attempting to write down the statements made by the defendant. Certainly, Detective Roach, who had been a police officer for many years, knew that if he sought damaging statements from a person, to be used against him to prove his guilt, said statements would be more convincing if there were other witnesses present when the statements were made, and if then reduced to writing. The fact that there were no other witnesses, and that he was not taking notes, clearly indicates that he was investigating the matter and was not attempting a Star Chamber proceeding, as is implied by the defense.

There is presently a mild clamour in law enforcement circles regarding the rulings of the Court as to rights of a person under the Bill of Rights. Law enforcement officers sometimes contend that to grant to a party the right of counsel and other constitutional rights presumably curtail their effectiveness. Regardless of the validity of this argument, this Court must be aware that to hold that under the circumstances of the instant case, the actions of Detective Roach violated any constitutional right of this defendant, requires this Court to hold that a police officer may never use a statement made by a person which incriminates that person. In the instant case, there was no confession. The police officer was investigating an apparent murder. He was talking to a person who was reportedly the last person to be with the deceased. He stated he had not arrested this person, and the person, by his comments to his wife, indicated that he did not believe he was being detained. There is no case which holds that the admission against interest made by the person not being detained may

not be admitted in a Court of law.

While we believe it was not necessary under these circumstances, certainly the fact that Detective Roach advised the defendant that he could talk to an attorney or could seek other help completely abrogates any sinister or accusatory motive on the part of this officer and would comply with the constitutional requirements had the defendant been under arrest.

It should be noted that defendant relies heavily on principles of law set forth in Alexander v. Green, 2 O.S. (2d) 231, 31 O.O. (2d) 231 and People v. Dorado, 394 P. (2d) 952, 40 Cal. Rptr. 264, however, a cursory reading of these cases indicate that in the Alexander matter a statement was elicited from the defendant after arrest, and in the Dorado case the investigation had focused on the defendant when the incriminating statement was given by the defendant without the requisite warnings.

It is most apparent that in the instant case, the defendant was neither under arrest nor was the investigation focused on the defendant, moreover, the police were merely conducting a general investigation of a murder.

(3) Mere indication by prospective juror during voir dire, that he had discussed the case pro and con prior to trial, does not deprive defendant of a fair and impartial trial.

The defendant here contends that the defendant was not afforded a fair and impartial jury because of prejudice on the part of a juror. The State agrees that the defendant was entitled to receive a jury consisting of impartial members of the public. Defendant received such a jury. In his motion for a new trial filed below, the defendant contended that one of the jurors was prejudiced in spite of the fact that that juror was interrogated by counsel for the defendant on the voir dire examination, admitted that he had heard comments regarding the case, and denied that he had at that time formed an opinion as to the case. The defendant attempted to show this prejudice on the part of that juror by affidavits and testimony of other members of the jury panel. There was no outside evidence produced whatsoever.

On the basis of this showing, the Court below in essence refused to consider the claim of prejudice complying with that doctrine predicated on public policy that a verdict of a jury cannot be impeached solely by the testimony of its members or of the panel. Thus, contrary to the impression given in the brief of the defendant, the Court below did not rule that the juror charged with prejudice was free of prejudice, but the Court ruled in essence that there was no evidence upon which a hearing into that matter could be had.

The Trial Court's opinion on this matter set forth in its Opinion on a Motion for New Trial, pages 5, 6, 7, 8 and 9 is as follows:

"Under its claim of misconduct of the jury, the defense sought to prove what it claimed amounted to misconduct of the jurors and sought to do so solely through evidence by way of an affidavit of one of the jurors and the oral testimony of another. No evidence aliunde or dehors the proposed testimony of the jurors was offered. The Court ruled such evidence inadmissible. The claim is made that since the acts amounting to claimed misconduct occurred outside the Jury Room, or at least prior to the final submission of the case, that the usual rule of aliunde evidence is not applicable and that the jurors themselves may be called directly to testify concerning such matters and in this way thus impeach their verdict.

Before proceeding further, it should be pointed out that the claimed misconduct, if it were such, deals only with the communications of the jurors among themselves, that is to conversations concerning evidence admitted upon the trial and not in any way touching upon an outside communication or factual matters not in evidence. The rule has long been adhered to in this state that affidavits of jurors stating matters of alleged misconduct are not competent to support an application for a new trial unless evidence aliunde is first offered or unless the Court has acquired knowledge of the Jury's behavior from other sources. 16 OJ 2d 56. True, in most instances where the issue has arisen, efforts have been directed toward uncovering what went on in the Jury Room after final submission or with claimed communications with the jurors by outsiders, as distinguished from what is claimed to have transpired before final submission of the case. Examples of this type of cases in Ohio are Farrer v. State, 2 OS 54; Kent v. State, 42 OS 426; Schwindt v. Graeff, 109 OS 404; Wicker v. Cleveland, 150 OS 434; and State v. Miles, 69 NE 2d 39. The rule is one of deep seated public policy to the effect that testimony or affidavits of jurors themselves will not be received for the purpose of impeaching the verdict, at least until other evidence on the subject is first offered.

Whether the claimed misconduct occurred before or after final submission of the case to the jury, the policy involved would be violated in either event if the jurors alone were allowed to thus impune the verdict. Panel members become jurors immediately upon being sworn. The finality of jeopardy then attaches and the jurors certainly

do not don a different cloak when the case is finally submitted. This Court believes the rule should be the same whether the claim of misconduct occurs before or after final submission of the case. Such seems to be the general rule and the following are just a few of the many cases on the point. State v. Ferguson, 182 SW 2d 38; Huddleston v. State, 64 Southern 2d 90 (Ala.); Gossett v. State, 48 SE 2d 71 (Ga.); State v. Finnell, 280 SW 2d 110 (Mo.); Lindsey v. State, 25 SW 2d 533 (Tenn.); People v. Evans, 246 Pac. 2d 636 (Cal.); State v. Oliver, 192 Southern 725 (La.); and State v. Ingersoll, 292 Pac. 250 (Mont.). Such will likewise be the ruling of this Court. See Locicero v. State, 14 Abs. 109.

Under the rule barring testimony of jurors to impeach their own verdict, it is nevertheless almost universally held that testimony of jurors, however, may be admitted to sustain the verdict and this procedure is resorted to most often when a prima facia showing of misconduct is first made; but in the present case, since the Court has ruled that the affidavit and testimony of the two jurors are inadmissible to impeach this verdict, the State's affidavits of thirteen jurors, seeking to sustain the verdict by showing no misconduct, are irrelevant."

"Next it is argued that the defendant did not have a fair and impartial jury as required by the constitution for the reason that juror Gillespie had a prior fixed opinion that the defendant was guilty and withheld disclosure of such opinion upon inquiry on voir dire. In support of this contention, reference was made to the voir dire examination, and the affidavit and oral testimony of prospective juror Osborne were offered and admitted in evidence. In the opinion of the Court, the contention of the defense is not supported in either respect. In the first place, questions put upon voir dire clearly indicated that the joror had discussed the case pro and con, that opinions on guilt or innocence had been expressed, and indicated he may have expressed such an opinion himself. He did, however, answer unequivocally that he had no opinion as to guilt or innocence as he was then questioned."

"Osborne's affidavit is direct and positive and by its language certainly would tend to indicate a false answer on the part of Gillespie when inquired of on voir dire examination. The Court, however, recognizes, as well he must, that the

affidavit is in the language of defense counsel and not necessarily in the language of the witness. Osborne's oral testimony regarding the same subject, on the other hand, is much less specific, somewhat equivocal, and indicates the possibility that whatever he heard may have been spoken by one of four in a group of prospective jurors, two of whom were excused upon challenge for cause because they held fixed opinions on either guilt or innocence."

"Osborne was positive that some of the conversation he attributed to Gillespie took place on Wednesday, the third day of trial, whereas the minutes of the trial show that both were called into the Jury Box on Tuesday, the second day of trial, and Osborne was then excused because he had a very definite opinion in opposition to capital punishment. Osborne admits that he had no direct conversation with Gillespie but claims the statements attributed to him were remarks that he overheard in a group coversation."

"Gillespie categorically denied any such statements as attributed to him by Osborne and various others of the prospective jurors in company with Osborne and Gillespie in the assigned place for the meeting of the prospective jurors deny hearing any such statements from Gillespie. The Court fails to find under this state of the evidence that prospective juror Gillespie testified falsely upon voir dire and further holds that the defense has not sustained its burden of proof in this regard."

(4) An indictment for murder may be amended, under authority of Section 2941.30 Revised Code by insertion of the words "or attempting to perpetrate a rape" immediately following the words "in the perpetration of a rape"; such amendment not being a change in the name or identity of the crime charged and not prejudicing the accused in his defense.

As to the contention of the defendant that the Court erred in permitting the amendment to the indictment, this Court's attention is directed to the preceeding statements of facts and to page twenty-five (25) of defendant's brief, where the amendment to the indictment is set forth. In essence, the Trial Court permitted the State to amend the indictment by adding the words "or attempting to perpetrate rape" after the words "while in the perpetration of a rape" in the indictment. Defendant claimed below and here claims that the addition of such language constituted the addition of a second charge or a new crime to the indictment. In the case of Bryant v. State of Ohio, 48 App. 208, Hamilton County 1933, appeal dismissed 127 O.S. 593, the Court of Appeals for Hamilton County, considering the statutory authority granted the Trial Court, and found in Section 2941.30 Revised Code, (quoted in part on page 26 of defendant's brief herein), found no error in the Trial Court's allowing the State to amend an indictment, from murder while committing a robbery, to murder while attemting to commit a robbery. The Court said at page 210 of that decision:

> "The first question presented involves the nature of the amendment. Was there any change made in the name or identity of the crime charged? We conclude that there was no such change. The crime charged originally and in the indictment as amended was murder in the first degree. Of this crime the defendant was convicted. Even if such were not our conclusion, it is obvious from a reading of the record that the defendant was not mislead or prejudiced by the variance in respect to which the amendment was made, nor has any failure of justice resulted."

A similar conclusion reached in the case of State v. Holt, 59 O. App. 309, Court of Appeals for Franklin County, (1938).

If the Trial Court had not permitted the amendment and the defendant had been acquitted, there can be no doubt that a trial on a later indictment alleging murder while attempting a rape would constitute double jeopardy.

Section 2941.30 Revised Code, grants a Trial Court authority to permit an amendment to the indictment in form or substance, provided only that there may be thereby made no change in the name or identity of the crime. The defendant was charged with the crime of murder in the first degree and the amendment herein permitted in no way changes that charge.

The second contention of the defendant regarding the amendment to the indictment is that the granting of such amendment was not supported by facts and therefore the Court had no authority under the statutes to permit the amendment. The amendment was one from a killing while perpetrating a rape to a killing while attempting to perpetrate a rape. At the time the amendment was permitted there had been introduced the medical testimony set forth in the statement of facts and the photographs taken of the body of the deceased. The deceased lay in a hardened pool of her own blood. She was on her back and her legs were spread. The body was nude. Her coat was spread under her buttocks. There was a stab wound in her chest from which blood had flowed over her shoulder, clearly indicating that the blood was flowing from the wound as she lay. There was blood on her blouse and a cut in its material indicating that she was stabbed while wearing the blouse. Her face was crushed. Medical testimony concluded that there had been intercourse, but

this conclusion was based upon a finding of acid phosphatase with no spermatozoa. Under this state of the evidence, there can be no doubt that the Court was fully warranted in permitting the amendment to include attempt of rape which simply excluded the need to prove penetration. There is no other conclusion that any reasonable mind could draw from these facts.

Regarding the cases cited by the defendant in support of his contention, the State has never claimed and does not now claim that it was attempting to add vital or material elements of the offense. The matter added to the indictment does not accomplish this end. The citations are, therefore, of no effect in determining the point raised by the defendant.

(5) Where, in the trial of a criminal case, evidence is introduced in rebuttal by the State to meet a claim or theory of the defense, the fact that such evidence also tends to prove some element or elements of the State's case in chief does not make such testimony inadmissible, nor is the State deprived of the benefit thereof as tending to prove the commission of the offense alleged in the indictment. The admission of evidence out of its order rests in the sound discretion of the Court. Unless some abuse of such discretion appears, when taken in connection with all the evidence in the case, such as to show that a party was prevented from having a fair trial, a verdict will not be disturbed upon that ground. See Holt v. The State of Ohio, 107 O.S. 307.

Here, as in the earlier assignments of error, the defendant's argument is predicated upon a misconception of the evidence. The defendant and his wife had testified on behalf of the defense, that the defendant had come home at approximately 1:30 A.M. on September 15, 1964, and that she and the defendant remained home the rest of the evening. Mrs. Rosemary Karr testified in rebuttal that she had seen the defendant's wife leave the home at approximately 3:10 A.M. on the same morning. This testimony was clearly in reply to the testimony given for the defense and as such was proper rebuttal testimony, 52 O.Jur. 2d, 561, Trial, Section 75.

At page 33 of his brief, the defendant cites the case of Itskin v. State, 51 App. 211 (1953), for the proposition that there exists in Ohio the right in the defense to submit surrebuttal in answer to rebuttal. The same contention is made by the defense for the case of State v. Lett, 106 App. 285 (1958). Section 2945.10 Revised Code providing for the order of proceeding in trial, grants no right of surrebuttal, and reads in pertinent part as follows:

> "Trial of an issue upon an indictment or information shall proceed before the Trial Court or jury as follows:.....
>
> (D) The State will then be confined to rebutting evidence, but the Court, for good reason, in furtherance of justice, may permit evidence to be offered by either side out of its order....

> The Court may deviate from the order of proceedings listed in this section."

This specific statutory procedure was following in the instant case and in an effort on the part of the Trial Court to grant wide latitude to the defendant, the Court permitted the defendant and his wife to testify as surrebuttal witnesses.

As stated above, the defendant's claim rests upon the ill-conceived premise that the rebuttal testimony was improper because, at least in the view of the defendant, it had a tendency to prove that he, the defendant, did not return home when he said he did. It is submitted that even if this be so, such evidence is proper rebuttal evidence. In this regard the Court's attention is directed to the third paragraph of the syllabus of the case Holt v. Ohio, 107, O.S. 307, which reads as follows:

> "Where, in the trial of a criminal case, evidence is introduced in rebuttal by the State to meet a claim or theory of the defense, the fact that such evidence also tends to prove some element or elements of the State's case in chief does not make such testimony inadmissible, nor is the State deprived of the benefit thereof as tending to prove the commission of the offense alleged in the indictment. The admission of evidence out of its order rests in the sound discretion of the court. Unless some abuse of such discretion appears, when taken in connection with all the evidence in the case, such as to show that a party was prevented from having a fair trial, a verdict will not be disturbed upon that ground."

The Trial Court, in its Opinion to a Motion for New Trial, page 5, stated with regard to the permission given the defendant and his wife to testify in surrebuttal:

> "The Court permitted the defendant and his wife to testify, as above noted. The Court's reasoning at the time was substantially this, that an explanation as to why the wife left the house at that hour ought to be allowed. Of course, she

> denied rather than explained it. This is not to say, however, that because the Court exercised its discretion in that direction with reference to that possible testimony the Court was required to back up and thereafter allow the introduction of the photographs and other testimony above referred to, or having barred the photographs and other testimony in denial of the witness Karr necessarily meant that the denial should carry through to the wife and the defendant and thereby bar the possible explanation of her leaving the house. It should be kept in mind that the issue of fact was first raised by the defense testimony and not during the State's case in chief.. It does not seem that the point of abuse of discretion is well taken."

The statute grants the State a right to rebut. The defense wanted to bring in witnesses and testimony not to deny, but to cast doubt, photos at angles, witnesses who did not hear anyone go out, and amateur weathermen. If the Court granted that, then could not the State bring in photos from different angles, an expert weatherman, and perhaps someone who heard a door close? The trial must end and the statute says it ends at rebuttal unless the Court permits otherwise.

There is no abuse of discretion on the part of the Trial Court. This assignment of error is without basis in fact.

CONCLUSION

It is, therefore, respectfully submitted that for the foregoing reasons, this Court should deny Defendant-Appellant's request for review of the within cause.

Respectfully submitted,

Joseph E. Mahoney

JOSEPH E. MAHONEY,
ATTORNEY FOR PLAINTIFF-APPELLEE
ASHTABULA COUNTY, OHIO

I, Joseph E. Mahoney, Prosecuting Attorney of Ashtabula County, Ohio, hereby certify that a copy of the within Memorandum was personally delivered to NAZOR & NAZOR, Attorneys at Law, Gillmore Building, Ashtabula, Ohio, on the 27th day of November, 1967.

Joseph E. Mahoney

JOSEPH E. MAHONEY,
ATTORNEY FOR PLAINTIFF-APPELLEE
ASHTABULA COUNTY, OHIO

APPENDIX A